Civil Justice Committee Meeting

March 15th, 2006
10:00 AM - 11:00 AM
24 House Office Building

REVISED

Allan G. Bense
Speaker

Mark Mahon
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Civil Justice Committee

Start Date and Time:	Wednesday, March 15, 2006 10:00 am
End Date and Time:	Wednesday, March 15, 2006 11:00 am
Location:	24 HOB
Duration:	1.00 hrs

Consideration of the following bill(s):

HB 789 CS Damage Prevention and Safety for Underground Facilities by Murzin
HB 907 Liens for Recovering, Towing, or Storing Vehicles and Vessels by Machek
HB 1019 Deceptive and Unfair Trade Practices by Pickens
HB 1047 Parental Relocation with a Child by Stargel
HB 1141 Conveyances of Land by Stargel
HB 1163 Vacation and Timeshare Plans by Mealor

Consideration of the following proposed committee bill(s):

PCB CJ 06-02 -- Adoption Records

NOTICE FINALIZED on 03/13/2006 16:02 by Hay.Tracey

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 789 CS Damage Prevention and Safety of Underground Facilities
SPONSOR(S): Murzin
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1394

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee	13 Y, 0 N, w/CS	Holt	Holt
2) Civil Justice Committee		Blalock	Bond
3) Finance & Tax Committee			
4) Commerce Council			
5)			

SUMMARY ANALYSIS

The Underground Facility Damage Prevention and Safety Act provides access for excavating contractors and the public to provide notification to the free-access notification system established by the creation of the Sunshine State One-Call of Florida, Inc., (SSOCOF) of their intent to engage in excavation or demolition.

HB 798 amends the Underground Facility Damage Prevention and Safety Act as follows:

- Provides that SSOCOF does not have a duty and is not permitted to locate or mark underground facilities, and exempts SSOCOF from liability for the failure of member operators to comply with the act.
- Reduces the number of days that an excavator must provide certain information before beginning any excavation or demolition, from "not less than 2 or more than 5" business days to "not less than 2" business days. This bill also provides an exception to this timing requirement for excavation beneath the waters of the state. This bill increases the number of days the information provided by the excavator is valid from 20 to 30 calendar days.
- Provides specific procedures for when a member operator receives notification from the system that excavation or demolition is planned in an area in conflict with their underground facility.
- Revises the non-criminal infraction section to:
  - Provide that fees and court cost be added to the civil penalty;
  - Provide that when a citation is issued by a local government entity, 80% of the penalty is to be directed to that local government entity; and
  - Provide that SSOCOF may retain legal representation regarding citations issued under this Act.
- Provides additional exemptions for certain pest control services and specific water control district activities.

This bill appears to have a negative recurring fiscal impact on state government revenues, and a corresponding positive recurring fiscal impact on local government revenues.

This act shall take effect October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the regulation of procedures that member operators and excavators must follow when providing information to and receiving notification from the free-access notification system.

B. EFFECT OF PROPOSED CHANGES:

Background

Chapter 93-240, L.O.F., created the "Underground Facility Damage Prevention and Safety Act" (Act), and is codified at ch. 556, F.S. The purpose of the act is to:

- Aid the public by preventing injury to persons or property and the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations;
- Create a not-for-profit corporation comprised of operators of underground facilities in Florida to administer the provisions of the act;
- Fund the cost of administration through contributions from the member operators for services provided to the member operators and from charges made to others for services requested and provided, such as record searches, education or training, and damage prevention activities;
- Reserve to the state the power to regulate any subject matter specifically addressed in the act; and
- Permit any local law enforcement officer or permitting agency inspector to enforce the act without the need to incorporate the provisions of the act into any local code or ordinance.

The Act establishes a statewide, one-call notification system. A single toll-free number is provided for persons to give notification of and intent to engage in excavation or demolition. Section 556.101, F.S., states that the purpose of the Act is to prevent injury "to persons and property and the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations."

Creation of a not-for-profit corporation was established pursuant to section 556.101(3)(c), F.S., comprised of Florida underground facilities operators (member operators) to administer the chapter provisions. As a result, Sunshine State One-Call of Florida, Inc., (SSOCOF), has been incorporated since February 1, 1993. The cost of the system is funded "entirely and exclusively" by assessed contributions from the member operators.

Effect of Bill

The bill amends several sections of the Act.

Section 1

The bill amends s. 556.101(2), F.S., pertaining to the legislative intent, to clarify that the SSOCOF is only the system administrator, and that SSOCOF is not required or permitted to locate or mark any underground facilities. Also, the term "permitting agency inspector" is deleted in paragraph (e) of 556.102(3), F.S., and the bill clarifies that at the local level any law enforcement officer, local government code inspector, or code enforcement officer is permitted to enforce the provisions of the Act without the need to incorporate these changes into any local code or ordinance.

Section 2

Obsolete language is removed from s. 556.102(8), F.S. of the bill related to small municipalities deferred participation in the one-call notification system. Membership for such municipalities became mandatory on January 1, 2003, and these entities are now included in the definition of "member operators."

Section 3

Additional obsolete language is removed from this section related to small municipalities deferred participation in the one-call notification system. Moreover, language is removed that refers to the formation of a not-for-profit corporation to administer the provisions of chapter 556, F.S. Sunshine State One-Call of Florida, Inc. has been incorporated since February 1, 1993 to fulfill this provision.

Section 4

Obsolete language is removed from s. 556.104, F.S., related to small municipalities deferred participation in the one-call notification system.

Section 5

Procedures for the SSOCOF notification system are outlined in s. 556.105, F.S. The bill amends several subsections as follows:

A. Section 556.105(1)(a), F.S., narrows the system notification window that is required prior to beginning any excavation or demolition from not less than "2 nor more than 5" full business days to not less than "2" full business days, except for an underwater excavation. Also, if available, a valid electronic address should also be provided to the system to facilitate positive responses. The duration for the validity of the information provided to the system by an excavator about a proposed excavation or demolition site is increased from 20 calendar days to 30 days, excluding the date information is provided to the system, Saturday, Sunday, or legal holidays.

B. Section 556.105(2), F.S., provides that the records of each notification "may not" in lieu of "shall not," be transferred from the system except under subpoena.

C. Section 556.105(3), F.S., makes clear that the system shall provide the person making notification with the names of the member operators in the affected area along with a notification number (ticket) specifying the date and time of the project notification.

D. Section 556.105(4), F.S., is created to inform excavators that upon request the notification number will be provided to any law enforcement officer, government code inspector, or code enforcement officer.

E. Also, presently numbered ss. 556.105(4), F.S. through 556.105(11), F.S., are renumbered and cross-references corrected.

F. Paragraph (b) of s. 556.105(6), F.S., provides that an excavator "may not" in lieu of "shall not," demolish in a noticed area until all member operator underground facilities have been marked, located, or removed. This provision gives excavator discretion to demolish or not demolish in areas not marked at the noticed site.

G. Presently designated s. 556.105(8)(a), F.S. is deleted. This change removes the provision related to specific circumstances for direct communication between a member operator and excavator. Also, obsolete language is deleted in 556.105(8)(b), F.S., related to a positive response system being implemented by January 1, 2004.

H. Section 556.105(9), F.S., is created to outline member operator responsibilities after receiving notification from the system. A member operator of underground facilities has 2 full business days to provide the system a positive response, indicating the status of operations to protect the facility, or 10 days for an underwater excavation. Further the bill establishes the one-call system as a central communication hub between excavators and member operators. However, the system is exempt from any requirement to initiate a positive response to an excavator when an excavator has not provided the system with a valid electronic address. The bill places the excavator responsible for verifying the system's positive response before beginning excavation. Moreover, the excavator becomes responsible for contacting a member operator, if it knows a member operator has an existing underground facility in the area, yet the facility is unmarked, and no positive response has been received by the system.

I. Section 556.105(10), F.S., is amended to read that when an operator marks the horizontal route of any underground facility it shall be according to the Uniform Color Code for Utilities of the American Public Works Association.

Section 6

Liability of the member operator, excavator, and system is outlined in s. 556.106, F.S. The bill amends paragraph (a) of s. 556.106(2), F.S. to correct a cross reference. Further, current language in paragraphs a-b of s. 556.106(2), F.S. reads as follows:

> (2)(a) In the event any person violates s. 556.105(1) or (5), and subsequently, whether by himself or herself or through the person's employees, contractors, subcontractors, or agents, performs an excavation or demolition which damages an underground facility of a member operator, it shall be rebuttably presumed that such person was negligent. Such person, if found liable, shall be liable for the total sum of the losses to all member operators involved as those costs are normally computed. Any damage for loss of revenue and loss of use shall not exceed $500,000 per affected underground facility, except that revenues lost by a governmental member operator, which revenues are used to support payments on principal and interest on bonds, shall not be limited. Any liability of the state and its agencies and its subdivisions which arises out of this chapter shall be subject to the provisions of s. 768.28.
>
> (b) If any excavator fails to discharge a duty imposed by the provisions of this act, such excavator, if found liable, shall be liable for the total sum of the losses to all parties involved as those costs are normally computed. Any damage for loss of revenue and loss of use shall not exceed $500,000 per affected underground facility, except that revenues lost by a governmental member operator, which revenues are used to support payments on principal and interest on bonds, shall not be limited.

The bill deletes the term "shall" throughout both paragraphs and replaces it with "may." The bill also deletes paragraph (e) of s. 556.106(2), F.S., to remove obsolete language related to nonmember small cities. The bill adds subsection (6) to provide that the system (SSOCOF) has no duty to mark or locate underground facilities and nor does a right of recovery exist against the system for failing to do so. Clarification is added that the system (SSOCOF) is not liable for the failure of a member operator to comply with the requirements of this act.

Section 7

Section 556.107, F.S. pertains to violations of the Act. The bill amends this section to correct cross references. It further deletes the term "permitting agency inspector" and replaces it with "government

code inspector" and "code enforcement officer." These two new terms, along with the current language "local or state law enforcement officer", specify the enforcement for this chapter.

Section 556.107(1), F.S. reads in part:

> (1) NONCRIMINAL INFRACTIONS.—
>
> (a) Violations of the following provisions are noncriminal infractions:
> 1. Section 556.105(1), relating to providing required information.
> 2. Section 556.105(5), relating to the avoidance of excavation.
> 3. Section 556.105(10), relating to the need to stop excavation or demolition.
> 4. Section 556.105(11), relating to the need to cease excavation or demolition activities.
> 5. Section 556.105(4)(b) and (c) relating to identification of underground facilities, if a member operator does not mark an underground facility, but not if a member operator marks an underground facility incorrectly.

Paragraph (c) of s. 556.107(1), F.S. reads in part:

> Any excavator or member operator who commits a noncriminal infraction under paragraph (a) may be required to appear before the county court. The civil penalty for any such infraction is $250, except as otherwise provided in this section.

The bill amends paragraph (c) to add fees and court costs to the civil penalty. It is unclear what fees this bill is referring to, whether they are attorney fees or administrative fees, etc. This bill also provides that if a local law enforcement officer, local government code inspector, or code enforcement officer issues the citation, an 80/20 split of the collected penalty occurs. Eighty percent goes to the local government that employs the local citing officer and 20% is retained by the clerk of court for administrative costs in addition to other fees or court costs. This bill takes 80% of the $250 fine that would go into the fine and forfeiture fund, and authorizes the clerk to distribute it to the local government entity whose employee issued the citation. The clerk will distribute the other 20% into the fine and forfeiture fund as required by s. 142.01, F.S.[1] If a state law enforcement officer issues the citation, the amount collected by the clerk shall be retained by the clerk for deposit into the fine and forfeiture fund established by s. 142.01, F.S.

Paragraph (d) of s. 556.107(1), F.S. reads in part:

> (d) Any person cited for an infraction under paragraph (a), unless required to appear before the county court, may:
>
> 1. Post a bond, which shall be equal in amount to the applicable civil penalty; The bill amends paragraph (d) to add fees and court cost to the bond amount.

Paragraph (e) of s. 556.107(1) reads in part:

> e) Any person charged with a noncriminal infraction under paragraph (a), unless required to appear before the county court, may:
>
> 1. Pay the civil penalty, in lieu of appearance, either by mail or in person, within 10 days after the date of receiving the citation;

[1] 142.01 Fine and forfeiture fund; clerk of the circuit court.—There shall be established by the clerk of the circuit court in each county of this state a separate fund to be known as the fine and forfeiture fund for use by the clerk of the circuit court in performing court-related functions.

The bill amends paragraph (e) to add fees and court cost to the civil penalty and payment is due within 30 days in lieu of 10 days.

Paragraph (f) of s. 556.107(1), F.S. reads:

> (f) Any person electing to appear before the county court or who is required to appear shall be deemed to have waived the limitations on the civil penalty specified in paragraph (c). The court, after a hearing, shall make a determination as to whether an infraction has been committed. If the commission of an infraction has been proven, the court may impose a civil penalty not to exceed $5,000. In determining the amount of the civil penalty, the court may consider previous noncriminal infractions committed.

The bill amends paragraph (f) to add court costs to the civil penalty.

The bill creates paragraph (i) in s. 556.107(1) to provide that the SSOCOF may, at its own expense retain legal representation as assistance in county court proceedings pertaining to citations issued under this section. SSOCOF may appear in infraction cases appealed to the circuit court, and the appellant in such appeals shall timely notify SSOCOF of appeals under this section.

Section 556.107(2), F.S. reads in part:

> (2) MISDEMEANORS.—Any person who knowingly and willfully removes or otherwise destroys the valid stakes or other valid physical markings described in s. 556.105(4)(b) and (c) used to mark the horizontal route of an underground facility commits a misdemeanor. . . For purposes of this subsection, stakes or other nonpermanent physical markings are considered valid for 20 calendar days. . .

The bill amends this section to extend information validity from 20 days to 30 days.

Section 8

Exemptions to the notification requirements are in s. 556.108, F.S. The section reads in part:

556.108 Exemptions.—The notification requirements provided in s. 556.105(1) do not apply to:

> (4) Any excavation of 18 inches or less for:
>
> (a) Surveying public or private property by surveyors or mappers as defined in chapter 472, excluding marked rights-of-way, marked easements, or permitted uses where marked, provided mechanized equipment is not used in the process of such surveying and the surveying is performed in accordance with the practice rules established under s. 472.027;

The bill amends paragraph (a) to include services performed by a pest control licensee under chapter 482, F.S., (Pest Control)

The bill creates paragraph (c) also in the exemption section for locating, repairing, connecting, adjusting, or routine maintenance of a private or public utility facility by an excavator, if mechanized equipment is not used.

Subsection (6) is created to provide an exemption for any excavation or related maintenance activity by a water control district created pursuant to Chapter 298, F.S., or special act provided:
(a) The activity is performed by a district employee; (b) The activity is performed within a district right-of-way or on district owned lands; (c) The district has required permits for all underground or

underwater facilities and maintains maps and locations of permitted underground or underwater facilities; and (d) all member operators' facilities within district rights-of-way or on district-owned lands are required to be permanently marked.

Section 9

This act shall take effect October 1, 2006.

C. SECTION DIRECTORY:

Section 1 amends s. 556.101, F.S., relating to legislative intent.

Section 2 amends s. 556.102(8), F.S, relating to obsolete language for small municipalities and amends the definition of "member operator."

Section 3 amends s. 556.103(1), F.S., relating to obsolete language and the creation of a not-for-profit corporation.

Section 4 amends s. 556.104, F.S., relating to obsolete language.

Section 5 amends s. 115.105, F.S., relating to procedures.

Section 6 amends s. 556.106, F.S., relating to the liability of the member operator, excavator, and system.

Section 7 amends s. 556.107, F.S., relating to violations.

Section 8 amends s. 556.108(4), F.S., relating to exemptions.

Section 9 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill will have a negative fiscal impact on state revenues due to the provision in the bill allowing money that would normally go into the fine and forfeiture fund to be directed to local government bodies under certain circumstances. An exact amount of increased revenue is unable to be determined due to the unknown number of citations that will be issued by state officials.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill will have an undetermined positive fiscal impact on local government revenues due to the provision in the bill allowing fines that normally go into the fine and forfeiture fund to be directed to the local government entity that issued the citation. An exact amount is unable to be determined due to the unknown number of citations that will be issued by local government entities.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 21, 2006, the Committee on Utilities and Telecommunications adopted two amendments. The amendments made the following revisions to the bill:

- Provides that the civil penalty collected from citations issued by a state law enforcement officer shall be retained by the clerk of court and deposited into the fine and forfeiture fund established pursuant to s. 142.01.
- For any person charged with a noncriminal infraction under paragraph (a) of s. 556.107(1), unless required to appear before the county court, the amendment increase the timeframe for payment from 10 days to 30 days.
- Creates a notification exemption for services performed by a pest control licensee under chapter 482 for excavation of 18 inches or less if mechanized equipment is not used.
- Creates a notification exemption for any excavation or related maintenance activity by a water control district created pursuant to Chapter 298, F.S., or special act, provided specific criteria are met.

CHAMBER ACTION

The Utilities & Telecommunications Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to damage prevention and safety for underground facilities; amending s. 556.101, F.S.; providing legislative intent that Sunshine State One-Call of Florida, Inc., is not required or permitted to locate or mark underground facilities; amending s. 556.102, F.S.; redefining the term "member operator" to remove an exception for a small municipality that elects not to participate in the notification system; amending ss. 556.103 and 556.104, F.S.; deleting provisions exempting a small city from membership in the Sunshine State One-Call of Florida, Inc.; amending s. 556.105, F.S.; requiring that specified information be placed in the excavation notification system; providing an exception for underwater excavations; providing that the information is valid for 30 calendar days; requiring that a notification number assigned to an excavator be provided to a law enforcement officer, government code inspector, or code enforcement

officer upon request; requiring that a member operator respond to the system within a specified time indicating the status of its facility protection operations; requiring the corporation to establish a communication system between member operators and excavators; requiring an excavator to verify the system's positive responses before beginning excavation; requiring operators to use a specified color-code manual; amending s. 556.106, F.S.; providing that the notification system has no duty to and may not mark or locate underground facilities; providing that a person has no right of recovery against the notification system for failing to mark or locate underground facilities; providing that the system is not liable for the failure of a member operator to comply with the requirements of the act; amending s. 556.107, F.S.; correcting cross-references; providing for the distribution of civil penalties; revising procedures for disposition of citations; authorizing the corporation to retain legal counsel to represent the corporation in certain legal proceedings; amending s. 556.108, F.S.; providing that certain excavations are exempt from mandatory location notification if mechanized equipment is not used; exempting pest control services and certain activities by a water control district under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 556.101, Florida Statutes, is amended to read:

556.101 Short title; legislative intent.--

(1) This act may be cited as the "Underground Facility Damage Prevention and Safety Act."

(2) It is the intent of the Legislature to provide access for excavating contractors and the public to provide notification to the system of their intent to engage in excavation or demolition. This notification system shall provide the member operators an opportunity to identify and locate their underground facilities. Under this notification system, Sunshine State One-Call of Florida, Inc., is not required or permitted to locate or mark underground facilities.

(3) It is the purpose of this act to:

(a) Aid the public by preventing injury to persons or property and the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations.

(b) Create a not-for-profit corporation comprised of operators of underground facilities in this state to administer ~~the provisions of~~ this act.

(c) Fund the cost of administration through contributions from the member operators for services provided to the member operators and from charges made to others for services requested and provided, such as record searches, education or training, and damage prevention activities.

(d) Reserve to the state the power to regulate any subject matter specifically addressed in this act.

(e) Permit any local law enforcement officer, local government code inspector, or code enforcement officer ~~or permitting agency inspector~~ to enforce this act without the need to incorporate the provisions of this act into any local code or ordinance.

(4) It is not the purpose of this act to amend or void any permit issued by a state agency for placement or maintenance of facilities in its right-of-way.

Section 2. Subsection (8) of section 556.102, Florida Statutes, is amended to read:

556.102 Definitions.--As used in this act:

(8) "Member operator" means any person who furnishes or transports materials or services by means of an underground facility ~~except a small municipality that has elected not to participate in the one-call notification system in the manner set forth in s. 556.103(1)~~.

Section 3. Subsection (1) of section 556.103, Florida Statutes, is amended to read:

556.103 Creation of the corporation; establishment of the board of directors; authority of the board; annual report.--

(1) The "Sunshine State One-Call of Florida, Inc." is ~~hereby~~ created as a not-for-profit corporation. Each operator of an underground facility in this state shall be a member of the corporation and shall use and participate in the system~~, except that a small city as defined in s. 120.52 may elect by January 1, 1998, not to participate in the system until January 1, 2003, through a written notification identifying any reasons for declining membership. The corporation shall be formed by June 1,~~

~~1993~~. The corporation shall administer the provisions of this act. The corporation shall exercise its powers through a board of directors established pursuant to this section.

Section 4. Section 556.104, Florida Statutes, is amended to read:

556.104 Free-access notification system.--The corporation shall maintain a free-access notification system. Any person who furnishes or transports materials or services by means of an underground facility in this state shall participate as a member operator of the system ~~except that a small city as defined in s. 120.52 may elect not to participate in the system in the manner set forth in s. 556.103(1)~~. The purpose of the system is to receive notification of planned excavation or demolition activities and to notify member operators of the ~~such~~ planned excavation or demolition activities. The system shall provide a single toll-free telephone number within this state which excavators can use to notify member operators of planned excavation or demolition activities, and the system may also provide additional modes of access at no cost to the user.

Section 5. Section 556.105, Florida Statutes, is amended to read:

556.105 Procedures.--

(1)(a) Not less than 2 ~~nor more than 5~~ full business days before beginning any excavation or demolition, except an excavation beneath the waters of the state, an excavator shall provide the following information through the system:

1. The name of the individual who provided notification and the name, address, including the street address, city, state, zip code, and telephone number of her or his employer.

2. The name and telephone number of the representative for the excavator, and a valid electronic address to facilitate a positive response by the system should be provided, if available.

3. The county, the city or closest city, and the street address or the closest street, road, or intersection to the location where the excavation or demolition is to be performed, and the construction limits of the excavation or demolition.

4. The commencement date and anticipated duration of the excavation or demolition.

5. Whether machinery will be used for the excavation or demolition.

6. The person or entity for whom the work is to be done.

7. The type of work to be done.

8. The approximate depth of the excavation.

(b) The excavator shall provide the ~~such~~ information by notifying the system through its free-access notification system during business hours, as determined by the corporation, or by such other method as authorized by the corporation. Any notification received by the system at any time other than during business hours shall be considered to be received at the beginning of the next business day.

(c) Information provided by an excavator is ~~shall be considered~~ valid for 30 ~~a period of 20~~ calendar days after the ~~each~~ date such information is provided to the system. In

computing the period for which information furnished is ~~considered~~ valid, the date the notice is provided is ~~shall~~ not ~~be~~ counted, but the last day of the ~~such~~ period shall be counted unless it is a Saturday, Sunday, or a legal holiday, in which event, the period runs ~~shall run~~ until the end of the next day that ~~which~~ is not a Saturday, Sunday, or a legal holiday.

(2) Each notification by means of the system shall be recorded to document compliance with this act. Such record may be made by means of electronic, mechanical, or any other method of all incoming and outgoing wire and oral communications concerning location requests in compliance with chapter 934. The ~~Such~~ records shall be kept for ~~a period of~~ 5 years and, upon written request, shall be available to the excavator making the request, the member operator intended to receive the request, and their agents. However, custody of the records may ~~shall~~ not be transferred from the system except under subpoena.

(3) The system shall provide the person who provided notification with the names of the member operators who shall ~~will~~ be advised of the notification and a notification number that ~~which~~ specifies the date and time of the notification.

(4) The notification number provided to the excavator under this section shall be provided to any law enforcement officer, government code inspector, or code enforcement officer upon request.

(5) ~~(4)~~ All member operators within the defined area of a proposed excavation or demolition shall be promptly notified through the system, except that member operators with state-owned underground facilities located within the right-of-way of

a state highway need not be notified of excavation or demolition activities and are under no obligation to mark or locate the ~~such~~ facilities.

(a) When an excavation site cannot be described in information provided under subparagraph (1)(a)3. with sufficient particularity to enable the member operator to ascertain the excavation site, and if the excavator and member operator have not mutually agreed otherwise, the excavator shall premark the proposed area of the excavation before a member operator is required to identify the horizontal route of its underground facilities in the proximity of any excavation. However, premarking is not required for any excavation that is over 500 feet in length and is not required where the premarking could reasonably interfere with traffic or pedestrian control.

(b) If a member operator determines that a proposed excavation or demolition is in proximity to or in conflict with an underground facility of the member operator, except a facility beneath the waters of the state, which is governed by paragraph (c), the member operator shall identify the horizontal route by marking to within 24 inches from the outer edge of either side of the underground facility by the use of stakes, paint, flags, or other suitable means within 2 full business days after the time the notification is received under subsection (1). If the member operator is unable to respond within such time, the member operator shall communicate with the person making the request and negotiate a new schedule and time that is agreeable to, and should not unreasonably delay, the excavator.

(c) If a member operator determines that a proposed excavation is in proximity to or in conflict with an underground facility of the member operator beneath the waters of the state, the member operator shall identify the estimated horizontal route of the underground facility, within 10 business days, using marking buoys or other suitable devices, unless directed otherwise by an agency having jurisdiction over the waters of the state under which the member operator's underground facility is located.

(d) When excavation is to take place within a tolerance zone, an excavator shall use increased caution to protect underground facilities. The protection requires hand digging, pot holing, soft digging, vacuum excavation methods, or other similar procedures to identify underground facilities. Any use of mechanized equipment within the tolerance zone must be supervised by the excavator.

(6)(a) ~~(5)(a)~~ An excavator shall avoid excavation in the area described in the notice given under ~~pursuant to~~ subsection (1) until each member operator underground facility has been marked and located or until the excavator has been notified that no member operator has underground facilities in the area described in the notice, or for the time allowed for markings set forth in paragraphs (5)(b) ~~(4)(b)~~ and (c), whichever occurs first. If a member operator has not located and marked its underground facilities within the time allowed for marking set forth in paragraphs (5)(b) ~~(4)(b)~~ and (c), the excavator may proceed with the excavation, if ~~provided~~ the excavator does so with reasonable care~~,~~ and if ~~provided, further, that~~ detection

equipment or other acceptable means to locate underground facilities are used.

(b) An excavator may ~~shall~~ not demolish in the area described in the notice given under ~~pursuant to~~ subsection (1) until all member operator underground facilities have been marked and located~~,~~ or removed.

(7)(a) ~~(6)(a)~~ A member operator that states that it does not have accurate information concerning the exact location of its underground facilities is exempt from the requirements of paragraphs (5)(b) ~~(4)(b)~~ and (c), but shall provide the best available information to the excavator in order to comply with the requirements of this section. An excavator is not liable for any damage to an underground facility under the exemption in this subsection if the excavation or demolition is performed with reasonable care and detection equipment or other acceptable means to locate underground facilities are used.

(b) A member operator may not exercise the exemption provided by this subsection if the member operator has underground facilities that have not been taken out of service and that are locatable using available designating technologies to locate underground facilities.

(8)(a) ~~(7)(a)~~ If extraordinary circumstances exist, a member operator shall notify the system of the member operator's inability to comply with this section. For the purposes of this section, the term "extraordinary circumstances" means circumstances other than normal operating conditions that ~~which~~ exist and make it impractical for a member operator to comply with ~~the provisions of~~ this act. After the system has received

notification of a member operator's inability to comply, the system shall make that information known to excavators who subsequently notify the system of an intent to excavate. The member operator is relieved of responsibility for compliance under the law during the period that the extraordinary circumstances exist and shall promptly notify the system when the extraordinary circumstances cease to exist.

(b) During the period when extraordinary circumstances exist, the system shall remain available during business hours to provide information to governmental agencies, member operators affected by the extraordinary circumstances, and member operators who can provide relief to the affected parties, unless the system itself has been adversely affected by extraordinary circumstances.

(9)(a) After receiving notification from the system, a member operator shall provide a positive response to the system within 2 full business days, or 10 such days for an underwater excavation, indicating the status of operations to protect the facility.

~~(8)(a) If a member operator determines that the excavation or demolition is not near an existing underground facility of the member operator, the member operator shall notify the excavator within 2 full business days after the time of the notification to the system that no conflict exists and that the excavation or demolition area is clear. An excavator who has knowledge of the existence of an underground facility of a member operator in the area is responsible for contacting the member operator if a facility is not marked.~~

(b) The system shall establish and maintain a process to facilitate a positive-response communication between member operators and excavators. The system is exempt from any requirement to initiate a positive response to an excavator when an excavator does not provide a valid electronic address to facilitate a positive response by the system.

(c) An excavator shall verify the system's positive responses before beginning excavation. If an excavator knows that an existing underground facility of a member operator is in the area, the excavator must contact the member operator if the facility is not marked and a positive response has not been received by the system. ~~The system shall implement procedures for positive response by January 1, 2004.~~

(10) ~~(9)~~ A member operator shall use the "Uniform Color Code for Utilities" ~~recommended guidelines for uniform temporary marking of underground facilities as approved by the Utility Location and Coordinating Council~~ of the American Public Works Association when marking the horizontal route of any underground facility of the operator.

(11) ~~(10)~~ Before ~~Prior to~~ or during excavation or demolition, if the marking of the horizontal route of any facility is removed or is no longer visible, the excavator shall stop excavation or demolition activities in the vicinity of the facility and shall notify the system to have the route remarked.

(12) ~~(11)~~ If any contact with or damage to any pipe, cable, or its protective covering, or any other underground facility occurs, the excavator causing the contact or damage shall immediately notify the member operator. Upon receiving notice,

the member operator shall send personnel to the location as soon as possible to effect temporary or permanent repair of the contact or damage. Until such time as the contact or damage has been repaired, the excavator shall cease excavation or demolition activities that may cause further damage to such underground facility.

Section 6. Subsection (2) of section 556.106, Florida Statutes, is amended, present subsection (6) is redesignated as subsection (7) and amended, and a new subsection (6) is added to that section, to read:

556.106 Liability of the member operator, excavator, and system.--

(2)(a) If a ~~In the event any~~ person violates s. 556.105(1) or (6) ~~(5)~~, and subsequently, whether by himself or herself or through the person's employees, contractors, subcontractors, or agents, performs an excavation or demolition that ~~which~~ damages an underground facility of a member operator, it is ~~shall be~~ rebuttably presumed that the ~~such~~ person was negligent. The ~~Such~~ person, if found liable, is ~~shall be~~ liable for the total sum of the losses to all member operators involved as those costs are normally computed. Any damage for loss of revenue and loss of use may ~~shall~~ not exceed $500,000 per affected underground facility, except that revenues lost by a governmental member operator whose~~, which~~ revenues are used to support payments on principal and interest on bonds may~~, shall~~ not be limited. Any liability of the state and its agencies and its subdivisions which arises out of this chapter is ~~shall be~~ subject to the provisions of s. 768.28.

(b) If any excavator fails to discharge a duty imposed by the provisions of this act, the ~~such~~ excavator, if found liable, is ~~shall be~~ liable for the total sum of the losses to all parties involved as those costs are normally computed. Any damage for loss of revenue and loss of use may ~~shall~~ not exceed $500,000 per affected underground facility, except that revenues lost by a governmental member operator whose~~, which~~ revenues are used to support payments on principal and interest on bonds may~~,~~ ~~shall~~ not be limited.

(c) Any liability of the state, its agencies, or its subdivisions which arises out of this act is ~~shall be~~ subject to the provisions of s. 768.28.

(d) Obtaining information as to the location of an underground facility from the member operator as required by this act does not excuse any excavator from performing an excavation or demolition in a careful and prudent manner, based on accepted engineering and construction practices, and it ~~nor~~ does not ~~it~~ excuse the ~~such~~ excavator from liability for any damage or injury resulting from any excavation or demolition.

~~(e) When an excavator knows or should know of the presence of an underground facility of a nonmember small city as defined in s. 120.52, he or she shall make reasonable efforts to contact the small city that owns or operates that facility prior to commencing an excavation or demolition.~~

(6) The system does not have a duty to mark or locate underground facilities and may not do so, and a right of recovery does not exist against the system for failing to mark or locate underground facilities. The system is not liable for

the failure of a member operator to comply with the requirements of this act.

(7) ~~(6)~~ An excavator who performs any excavation with hand tools under ~~pursuant to~~ s. 556.108(5) is liable for any damage to any operator's underground facilities damaged during such excavation.

Section 7. Section 556.107, Florida Statutes, is amended to read:

556.107 Violations.--

(1) NONCRIMINAL INFRACTIONS.--

(a) Violations of the following provisions are noncriminal infractions:

1. Section 556.105(1), relating to providing required information.

2. Section 556.105(6) ~~556.105(5)~~, relating to the avoidance of excavation.

3. Section 556.105(11) ~~556.105(10)~~, relating to the need to stop excavation or demolition.

4. Section 556.105(12) ~~556.105(11)~~, relating to the need to cease excavation or demolition activities.

5. Section 556.105(5)(b) ~~556.105(4)(b)~~ and (c) relating to identification of underground facilities, if a member operator does not mark an underground facility, but not if a member operator marks an underground facility incorrectly.

(b) Any excavator or member operator who commits a noncriminal infraction under paragraph (a) may be issued a citation by any local or state law enforcement officer, government code inspector, or code enforcement officer

~~permitting agency inspector~~, and the issuer of a citation may require an ~~any~~ excavator to cease work on any excavation or not start a proposed excavation until there has been compliance with the provisions of this act. Citations may be issued to any employee of the excavator or member operator who is directly involved in the noncriminal infraction.

(c) Any excavator or member operator who commits a noncriminal infraction under paragraph (a) may be required to appear before the county court. The civil penalty for any such infraction is $250 plus fees and court costs, except as otherwise provided in this section. If a citation is issued by a local law enforcement officer, a local government code inspector, or a code enforcement officer, 80 percent of the civil penalty collected by the clerk of the court shall be distributed to the local governmental entity whose employee issued the citation and 20 percent of the penalty shall be retained by the clerk to cover administrative costs, in addition to other fees or court costs. If a citation is issued by a state law enforcement officer, the civil penalty collected by the clerk shall be retained by the clerk for deposit into the fine and forfeiture fund established pursuant to s. 142.01. Any person who fails to appear or otherwise properly respond to a citation issued pursuant to paragraph (d) shall, in addition to the citation, be charged with the offense of failing to respond to such citation and, upon conviction, commits ~~be guilty of~~ a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A written warning to this effect shall be

provided at the time any citation is issued pursuant to paragraph (b).

(d) Any person cited for an infraction under paragraph (a), unless required to appear before the county court, may:

1. Post a bond, which shall be equal in amount to the applicable civil penalty plus fees or court costs; or

2. Sign and accept a citation indicating a promise to appear before the county court.

The person issuing the citation ~~officer~~ may indicate on the citation the time and location of the scheduled hearing and shall indicate the applicable civil penalty.

(e) Any person charged with a noncriminal infraction under paragraph (a), unless required to appear before the county court, may:

1. Pay the civil penalty plus fees and court costs, in lieu of appearance, either by mail or in person, within 30 ~~10~~ days after the date of receiving the citation; or

2. Forfeit bond, if a bond has been posted, by not appearing at the designated time and location.

If the person cited follows either of the above procedures, she or he is ~~shall be~~ deemed to have admitted to committing the infraction and to have waived the right to a hearing on the issue of commission of the infraction. The ~~Such~~ admission may be used as evidence in any other proceeding under this act.

(f) Any person electing to appear before the county court or who is required to appear shall be deemed to have waived the

limitations on the civil penalty specified in paragraph (c). The court, after a hearing, shall make a determination as to whether an infraction has been committed. If the commission of an infraction has been proven, the court may impose a civil penalty not to exceed $5,000 plus court costs. In determining the amount of the civil penalty, the court may consider previous noncriminal infractions committed.

(g) At a hearing under this chapter, the commission of a charged infraction must be proven by a preponderance of the evidence.

(h) If a person is found by the hearing official to have committed an infraction, the ~~such~~ person may appeal that finding to the circuit court.

(i) Sunshine State One-Call of Florida, Inc., may, at its own cost, retain an attorney to assist in the presentation of relevant facts and law in the county court proceeding pertaining to the citation issued under this section. The corporation may also appear in any case appealed to the circuit court if a county court finds that an infraction of the chapter was committed. An appellant in the circuit court proceeding shall timely notify the corporation of any appeal under this section.

(2) MISDEMEANORS.--Any person who knowingly and willfully removes or otherwise destroys the valid stakes or other valid physical markings described in s. 556.105(5)(b) ~~s. 556.105(4)(b)~~ and (c) used to mark the horizontal route of an underground facility commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. For purposes of this subsection, stakes or other nonpermanent physical markings are

considered valid for 30 ~~20~~ calendar days after information is provided to the system under s. 556.105(1)(c).

Section 8. Subsections (4) and (5) of section 556.108, Florida Statutes, are amended, and subsection (6) is added to that section, to read:

556.108 Exemptions.--The notification requirements provided in s. 556.105(1) do not apply to:

(4) Any excavation of 18 inches or less for:

(a) Surveying public or private property by surveyors or mappers as defined in chapter 472 and services performed by a pest control licensee under chapter 482, excluding marked rights-of-way, marked easements, or permitted uses where marked, if ~~provided~~ mechanized equipment is not used in the process of such surveying or pest control services and the surveying or pest control services are ~~is~~ performed in accordance with the practice rules established under s. 472.027 or s. 482.051, respectively; ~~or~~

(b) Maintenance activities performed by a state agency and its employees when such activities are within the right-of-way of a public road; however, ~~provided,~~ if a member operator has permanently marked facilities on such right-of-way, ~~no~~ mechanized equipment may not be used without first providing notification; or

(c) Locating, repairing, connecting, adjusting, or routine maintenance of a private or public utility facility by an excavator, if mechanized equipment is not used.

(5) Any excavation with hand tools by a member operator or an agent of a member operator for:

(a) Locating, repairing, connecting, or protecting, or routine maintenance of, the member operator's underground facilities; or

(b) The extension of a member operator's underground facilities onto the property of a person to be served by such facilities.

~~(c) The~~ The exemption provided in this subsection ~~paragraphs (a) and (b)~~ is limited to excavations to a depth of 30 inches if the right-of-way has permanently marked facilities of a company other than the member operator or its agents performing the excavation.

(6) Any excavation or related maintenance activity by a water control district created under chapter 298 or by special act if all of the following conditions are met:

(a) The activity is performed by a district employee.

(b) The activity is performed within a district right-of-way or on district-owned lands.

(c) The district has required permits for all underground or underwater facilities and maintains maps and locations of permitted underground or underwater facilities.

(d) All member operators' facilities within district rights-of-way or on district-owned lands are required to be permanently marked.

Section 9. This act shall take effect October 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 0789 CS**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Murzin offered the following:

Amendment (with title amendments)

Between line(s) 84 and 85 insert:

(f) Foster the awareness of federal laws and regulations that promote safety with respect to underground facilities, including, but not limited to, the Federal Pipeline Safety Act of 1968, as amended, the Pipeline Safety Improvement Act of 2002, OSHA Standard 1926.651, and the National Electric Safety Code, ANSI C-2, by requiring and facilitating the advance notice of activities by those who engage in excavation or demolition operations.

========== T I T L E A M E N D M E N T ==========

Remove line 11 and insert:

or mark underground facilities; providing purpose of the Underground Facility Damage Prevention and Safety Act; amending s. 556.102, F.S.;

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2 (for drafter's use only)

Bill No. **HB 0789 CS**

2

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Murzin offered the following:

Amendment

Remove line 389 and insert:

tools under s. 556.108(4)(c) or ~~pursuant to~~ s. 556.108(5) is liable for any damage

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 3 (for drafter's use only)

Bill No. **HB 0789 CS**

3

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Murzin offered the following:

Amendment

Remove line(s) 417-419 and insert:

the provisions of this act. Citations shall ~~may~~ be hand-delivered ~~issued~~ to any employee of the excavator or member operator who is ~~directly~~ involved in the non-criminal infraction. The citation shall be issued in the name of the excavator or member operator, whichever is applicable.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 4 (for drafter's use only)

Bill No. **HB 0789 CS**

4

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Murzin offered the following:

Amendment

Remove line(s) 423-456 and insert:

infraction is $250 plus court costs, except as otherwise provided in this section. If a citation is issued by a local law enforcement officer, a local government code inspector, or a code enforcement officer, 80 percent of the civil penalty collected by the clerk of the court shall be distributed to the local governmental entity whose employee issued the citation and 20 percent of the penalty shall be retained by the clerk to cover administrative costs, in addition to other court costs. If a citation is issued by a state law enforcement officer, the civil penalty collected by the clerk shall be retained by the clerk for deposit into the fine and forfeiture fund established pursuant to s. 142.01. Any person who fails to appear or otherwise properly respond to a citation issued pursuant to paragraph (d) shall, in addition to the citation, be charged with the offense of failing to respond to such citation and, upon conviction, commits ~~be guilty of~~ a misdemeanor of the

second degree, punishable as provided in s. 775.082 or s. 775.083. A written warning to this effect shall be provided at the time any citation is issued pursuant to paragraph (b).

(d) Any person cited for an infraction under paragraph (a), unless required to appear before the county court, may:

1. Post a bond, which shall be equal in amount to the applicable civil penalty plus court costs; or

2. Sign and accept a citation indicating a promise to appear before the county court.

The person issuing the citation ~~officer~~ may indicate on the citation the time and location of the scheduled hearing and shall indicate the applicable civil penalty.

(e) Any person charged with a noncriminal infraction under paragraph (a), unless required to appear before the county court, may:

1. Pay the civil penalty plus court costs, in

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 5 (for drafter's use only)

Bill No. **HB 0789 CS**

5

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Murzin offered the following:

Amendment (with directory and title amendments)

Remove line(s) 504-522 and insert:

(1) Any excavation or demolition performed by the owner of a single-family residential property, not including property that is subdivided or is to be subdivided into more than one single-family residential property; or for such owner by a member operator when such excavation or demolition is made entirely on such land, and only up to a depth of 10 inches; provided due care is used and there is no encroachment on any member operator's right-of-way, easement, or permitted use.

(4) Any excavation of 18 inches or less for:

(a) Surveying public or private property by surveyors or mappers as defined in chapter 472 and services performed by a pest control licensee under chapter 482, excluding marked rights-of-way, marked easements, or permitted uses where marked, if ~~provided~~ mechanized equipment is not used in the process of such surveying or pest control services and the surveying or pest control services are ~~is~~ performed in accordance with the

practice rules established under s. 472.027 or s. 482.051, respectively; ~~or~~

(b) Maintenance activities performed by a state agency and its employees when such activities are within the right-of-way of a public road; however, ~~provided,~~ if a member operator has permanently marked facilities on such right-of-way, ~~no~~ mechanized equipment may not be used without first providing notification; or

(c) Locating, repairing, connecting, adjusting, or routine maintenance of a private or public underground facility by an excavator, if the excavator is performing such work for the current owner or future owner of the underground facility and if mechanized equipment is not used.

========== D I R E C T O R Y A M E N D M E N T ==========

Remove line 499 and insert:

Section 8. Subsections (1), (4), and (5) of section 556.108,

========== T I T L E A M E N D M E N T ==========

Remove line 44 and insert:

providing for excavation or demolition performed by the owner of a single-family residential property; providing that certain excavators are exempt from

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 907 Liens for Recovering, Towing, or Storing Vehicles and Vessels
SPONSOR(S): Machek , Allen
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Transportation Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Current law provides that a business that recovers, tows, or stores a vehicle or vessel has a lien against the vehicle or vessel for the cost of towing and storage. Current law requires notice by certified mail, return receipt requested, to the owner of the vehicle or vessel regarding the lien.

This bill removes the requirement that "return receipt requested" postal services be used when notifying an owner, lienholder, and insurer of a vehicle or vessel of the lien.

This bill does not appear to have a fiscal impact on state or local governments. This bill reduces the cost to the private sector of sending notices by $1.85 per notice.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill reduces the regulatory requirements imposed on a business that tows, recovers, or stores vehicles or vessels.

B. EFFECT OF PROPOSED CHANGES:

Section 713.78, F.S., provides when a company properly tows a vehicle or vessel, the company has a lien against the vehicle or vessel for payment of reasonable recovery, towing and storage fees.[1] Within 7 business days, the company must determine the name and address of the registered owner, all lien holders, and the vehicle or vessel's insurer, by searching records held by the Department of Highway Safety and Motor Vehicles (DHSMV) or corresponding agency in other states.[2] Also within those 7 business days, the company must send a notice by certified mail, return receipt requested, to the owner, lien holders, and insurance company, notice that includes:[3]

- A statement that the company has taken possession of the vehicle or vessel;
- That a lien is claimed;
- The amount of the towing and storage charges accrued;
- That the lien claimed is enforceable by law;
- That the owner or other lienholder in entitled to a hearing to determine whether her or his vehicle or vessel was wrongfully taken from her or him; and
- That a vehicle or vessel which remains unclaimed, or for which recovery, towing, or storage charges remain unpaid, may be sold free of all prior liens after 35 days if the vehicle or vessel is more than 3 years old, or after 50 days if the vehicle or vessel is 3 years of age or less.

If unable to locate the name and address of the owner or lienholder, the company must notify the local public agency by certified mail indicating the lack of ownership information.[4]

Vehicles or vessels remaining unclaimed may be sold at public auction. For vehicles or vessels more than three years old, the sale may take place no sooner than 35 days from the time the vehicle or vessel was stored.[5] For vehicles or vessels three years old or less, the sale may not take place sooner than 50 days from the time of storage.[6] If the date of the sale was not included in the initial notification to the owner and any lienholder, notice must be given by certified mail, return receipt requested, to the owner and any lienholder with the information no later than 15 days before the sale. Additionally, the sale must be advertised once in a general circulation newspaper, at least 10 days before the sale. Proceeds of the sale, less the towing and storage costs, and the cost of the sale, are deposited with the clerk of the circuit court if the owner is absent.[7]

---

[1] The owner of the vehicle or vessel may not be charged storage fees if the vehicle has been stored for less than 6 hours. Section 713.78(2), F.S.
[2] Section 713.78(4)(a), F.S.
[3] Section 713.78(4)(c), F.S.
[4] Section 713.78(4)(d), F.S.
[5] Section 713.78(6), F.S.
[6] *Id.*
[7] *Id.*

The United States Post Office describes certified mail service, and return receipt service, as follows:

> With Certified Mail™ you can be sure your article arrived at its destination with access to online delivery information. When you use Certified Mail, you receive a receipt stamped with the date of mailing. A unique article number allows you to verify delivery online. As an additional security feature, the recipient's signature is obtained at the time of delivery and a record is maintained by the Post Office™. For an additional fee, you can request a copy of the signature record before or after delivery with Return Receipt.[8]
>
> Choose Return Receipt when you want proof of delivery (information about the recipient's signature and actual delivery address). A return receipt may be purchased before or after the mailing. A mailer purchasing return receipt service at the time of mailing may choose to receive the return receipt by mail or e-mail. Mailers that receive the return receipt in the mail receive a green postcard with the recipient's actual signature. Mailers that receive the return receipt via e-mail receive a proof of delivery letter arriving as a PDF attachment that includes an image of the recipient's signature.[9]

Currently, certified mail service alone is $2.40, and return receipt service is an additional $1.85.

Effect of Bill

This bill removes the requirement that notices regarding the lien for recovery, towing and storage of a vehicle or vessel be sent using only certified mail service. This bill eliminates the requirement to use return receipt service.

This bill requires the company sending notice to retain the proof of mailing, and must provide the proof of mailing to any person involved in the lien.

In the event an unclaimed vehicle or vessel is sold at public auction to recover towing and storage charges, the bill also provides for towing-storage operators to be paid for "other applicable charges." Neither current law nor the bill define what the term "other applicable charges" includes.

C. SECTION DIRECTORY:

Section 1 amends s. 713.78, F.S., to eliminate the requirement to use return receipt requested service when mailing notices regarding a lien against a vehicle or vessel for recovery, towing or storage.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

---

[8] http://www.usps.com/send/waystosendmail/extraservices/certifiedmailservice.htm
[9] http://www.usps.com/send/waystosendmail/extraservices/returnreceiptservice.htm

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will reduce the cost to send a notice required by s. 713.78, F.S., by $1.85.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires a company that provides recovery, towing or storage services for vehicles or vessels to retain the proof of mailing and provide it to any person involved in the action upon request. As written, it requires the company to provide the original document. Also, it is unclear the length of time the proof of mailing must be maintained. The retention of these records could perhaps be tied to a statute of limitations, for example the general statute of limitations located in s. 95.11(3), F.S., or 4 years.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

A bill to be entitled

An act relating to liens for recovering, towing, or storing vehicles and vessels; amending s. 713.78, F.S.; revising certain requirements relating to notice provided by mail to the owner, insurance company, and persons claiming a lien against the vehicle or vessel; requiring that proof of mailing be retained and provided to certain persons upon request; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (4) and (6) of section 713.78, Florida Statutes, are amended to read:

713.78 Liens for recovering, towing, or storing vehicles and vessels.--

(4)(a) Any person regularly engaged in the business of recovering, towing, or storing vehicles or vessels who comes into possession of a vehicle or vessel pursuant to subsection (2), and who claims a lien for recovery, towing, or storage services, shall give notice to the registered owner, the insurance company insuring the vehicle notwithstanding the provisions of s. 627.736, and to all persons claiming a lien thereon, as disclosed by the records in the Department of Highway Safety and Motor Vehicles or of a corresponding agency in any other state.

(b) Whenever any law enforcement agency authorizes the removal of a vehicle or vessel or whenever any towing service, garage, repair shop, or automotive service, storage, or parking

place notifies the law enforcement agency of possession of a vehicle or vessel pursuant to s. 715.07(2)(a)2., the applicable law enforcement agency shall contact the Department of Highway Safety and Motor Vehicles, or the appropriate agency of the state of registration, if known, within 24 hours through the medium of electronic communications, giving the full description of the vehicle or vessel. Upon receipt of the full description of the vehicle or vessel, the department shall search its files to determine the owner's name, the insurance company insuring the vehicle or vessel, and whether any person has filed a lien upon the vehicle or vessel as provided in s. 319.27(2) and (3) and notify the applicable law enforcement agency within 72 hours. The person in charge of the towing service, garage, repair shop, or automotive service, storage, or parking place shall obtain such information from the applicable law enforcement agency within 5 days after the date of storage and shall give notice pursuant to paragraph (a). The department may release the insurance company information to the requestor notwithstanding the provisions of s. 627.736.

(c) Notice by certified mail~~, return receipt requested,~~ shall be sent within 7 business days after the date of storage of the vehicle or vessel to the registered owner, the insurance company insuring the vehicle notwithstanding the provisions of s. 627.736, and all persons of record claiming a lien against the vehicle or vessel. Proof of mailing must be retained and provided to any person involved in an action upon request. The notice must ~~It shall~~ state the fact of possession of the vehicle or vessel, that a lien as provided in subsection (2) is claimed,

that charges have accrued and the amount thereof, that the lien is subject to enforcement pursuant to law, ~~and~~ that the owner or lienholder, if any, has the right to a hearing as set forth in subsection (5), and that any vehicle or vessel that ~~which~~ remains unclaimed, or for which the charges for recovery, towing, or storage services remain unpaid, may be sold free of all prior liens after 35 days if the vehicle or vessel is more than 3 years of age or after 50 days if the vehicle or vessel is 3 years of age or less.

(d) If attempts to locate the name and address of the owner or lienholder prove unsuccessful, the towing-storage operator shall, after 7 working days, excluding Saturday and Sunday, following ~~of~~ the initial tow or storage, notify the public agency of jurisdiction in writing by certified mail or acknowledged hand delivery that the towing-storage company has been unable to locate the name and address of the owner or lienholder and a physical search of the vehicle or vessel has disclosed no ownership information and a good faith effort has been made. Proof of mailing must be retained and provided to any person involved in an action upon request. For purposes of this paragraph and subsection (9), "good faith effort" means that the following checks have been performed by the company to establish prior state of registration and for title:

1. Check of vehicle or vessel for any type of tag, tag record, temporary tag, or regular tag.

2. Check of law enforcement report for tag number or other information identifying the vehicle or vessel, if the vehicle or vessel was towed at the request of a law enforcement officer.

3. Check of trip sheet or tow ticket of tow truck operator to see if a tag was on vehicle or vessel at beginning of tow, if private tow.

4. If there is no address of the owner on the impound report, check of law enforcement report to see if an out-of-state address is indicated from driver license information.

5. Check of vehicle or vessel for inspection sticker or other stickers and decals that may indicate a state of possible registration.

6. Check of the interior of the vehicle or vessel for any papers that may be in the glove box, trunk, or other areas for a state of registration.

7. Check of vehicle for vehicle identification number.

8. Check of vessel for vessel registration number.

9. Check of vessel hull for a hull identification number which should be carved, burned, stamped, embossed, or otherwise permanently affixed to the outboard side of the transom or, if there is no transom, to the outmost seaboard side at the end of the hull that bears the rudder or other steering mechanism.

(6) Any vehicle or vessel that ~~which~~ is stored pursuant to subsection (2) and that ~~which~~ remains unclaimed, or for which reasonable charges for recovery, towing, or storing remain unpaid, and any contents not released pursuant to subsection (10), may be sold by the owner or operator of the storage space for such towing, ~~or~~ storage, and other applicable charges ~~charge~~ after 35 days following ~~from~~ the time the vehicle or vessel is stored therein if the vehicle or vessel is more than 3 years of age or after 50 days following the time the vehicle or vessel is

stored therein if the vehicle or vessel is 3 years of age or less. The sale shall be at public auction for cash. If the date of the sale was not included in the notice required in subsection (4), notice of the sale shall be given to the person in whose name the vehicle or vessel is registered and to all persons claiming a lien on the vehicle or vessel as shown on the records of the Department of Highway Safety and Motor Vehicles or of the corresponding agency in any other state. Notice shall be sent by certified mail~~, return receipt requested,~~ to the owner of the vehicle or vessel and the person having the recorded lien on the vehicle or vessel at the address shown on the records of the registering agency and shall be mailed not less than 15 days before the date of the sale. Proof of mailing must be retained and provided to any person involved in the action upon request. After diligent search and inquiry, if the name and address of the registered owner or the owner of the recorded lien cannot be ascertained, the requirements of notice by mail may be dispensed with. In addition to the notice by mail, public notice of the time and place of sale shall be made by publishing a notice thereof one time, at least 10 days prior to the date of the sale, in a newspaper of general circulation in the county in which the sale is to be held. The proceeds of the sale, after payment of reasonable towing and storage charges, and costs of the sale, in that order of priority, shall be deposited with the clerk of the circuit court for the county if the owner is absent, and the clerk shall hold such proceeds subject to the claim of the person legally entitled thereto. The clerk shall be entitled to receive 5 percent of such proceeds

for the care and disbursement thereof. The certificate of title issued under this law shall be discharged of all liens unless otherwise provided by court order.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1019 Deceptive and Unfair Trade Practices
SPONSOR(S): Pickens
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Economic Development, Trade & Banking Committee			
3) Criminal Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) authorizes a cause of action by a consumer against a business or individuals that engages in a described deceptive or unfair trade practice that harms the consumer.

This bill requires a consumer who seeks to sue under FDUTPA to first serve a potential defendant with a written demand at least 30 days before filing suit.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the procedural requirements related to prosecuting a civil action under the Florida Deceptive and Unfair Trade Practices Act.

B. EFFECT OF PROPOSED CHANGES:

General Background on the Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")[1] was enacted "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."[2]

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under FDUTPA. FDUTPA states a broad proscription, which applies through civil enforcement across industries and business conduct generally in any medium. The definition of "trade or commerce" in s. 501.203, F.S., on its face encompasses all advertising, soliciting, providing, offering, or distributing without limitation as to medium or subject matter. FDUTPA prohibits such acts in "any trade or commerce,"[3] except as its own provisions may specifically exempt.[4]

Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority,"[5] or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation.[6]

---

[1] Sections 501.201-501.213, F.S.
[2] Section 501.202(2), F.S.
[3] Section 501.204(1), F.S.
[4] FDUTPA expressly exempts from its provisions: retailers acting in good faith without actual knowledge of a violation, *see* s. 501.211(2), F.S.; acts or practices "required or specifically permitted by federal or state law," s. 501.212(1), F.S.; publication, broadcasting, printing or other dissemination of information on behalf of others without actual knowledge of a violation, *see* s. 501.212(2), F.S.; claims for personal injury, wrongful death, or damage to property other than property that is the basis of the violation, *see* s. 501.212(3), F.S.; claims against persons regulated by, or on the basis of activities regulated by, the Department of Financial Services, the Office of Insurance Regulation of the Financial Services Commission, or banks or savings and loan associations regulated by those entities or by federal agencies, *see* s. 501.212(4), F.S.; activities regulated by the Florida Public Service Commission, *see* s. 501.212(5), F.S.; or activities "involving the sale, lease, rental, or appraisal of real estate by a person licensed, certified, or registered pursuant to chapter 475 [regulation of realtors and real estate appraisers], which act or practice violates s. 475.42 [realtors' professional ethics] or 475.626 [appraisers' professional ethics]," *see* s. 501.212(6), F.S.; causes of action related to certain commercial real property transactions, *see* s. 501.212(7)(a), F.S.; and certain causes of action for failure to maintain real property, *see* s. 501.212(7)(b), F.S.
[5] Section 501.203(2), F.S. The state attorney is the default enforcing authority for FDUTPA violations within any particular judicial circuit. The Department of Legal Affairs ("DLA"), headed by the Attorney General, is the enforcing authority for FDUTPA violations occurring in or affecting more than one judicial circuit, and for single-circuit violations where the state attorney either defers to DLA in writing, or fails to act on the violation with 90 days of receiving a written complaint.
[6] A non-exhaustive list of some actionable acts, pursuant to s. 501.976, F.S., by a dealer are: represent directly or indirectly that a vehicle is a demonstrator; represent the previous usage or status of a vehicle to be something that it was not; represent the quality of care, regularity of servicing, or general condition of a vehicle unless known by the dealer to be true and supportable by material fact; represent orally or in writing that a particular vehicle has not sustained structural or substantial skin damage unless the statement is made in good faith and the vehicle has been inspected by the dealer; misrepresent warranty coverage; obtain signatures from a customer on contracts that are not fully completed at the time the customer signs or which do not reflect accurately the negotiations and agreement between the customer and the dealer; alter or change the odometer mileage of a vehicle; and sell a vehicle without disclosing to the customer the actual year and model of the vehicle.

Part VI of ch. 501, F.S., consisting of ss. 501.975 and 501.976, F.S., creates a FDUTPA cause of action specific to motor vehicle dealers. Section 501.976, F.S., lists activities and practices by a motor vehicle dealer that are actionable under FDUTPA.[7]

Current law does not require that a potential plaintiff contemplating a FDUTPA action send a demand letter and attempt to settle the action before filing suit.

Effect of Bill

The bill requires an individual, prior to filing a civil action under FDUTPA, or a FDUTPA action against a motor vehicle dealer,[8] to first send the potential defendant a demand letter. It should be noted, however, that these conditions do not apply to actions brought by a State Attorney or the Department of Legal Affairs (the enforcing authorities).

The applicable statute of limitations period for an action under FDUTPA will be tolled by the mailing of the notice required by this section for a period of 30 days for an individual claim or 90 days for a class action claim. This bill also requires the Department of Legal Affairs to prepare a sample notice for individual claims to be made available to the public.

Individual

At least 30 days before a potential plaintiff may sue for a FDUTPA violation, the plaintiff must provide an alleged defendant written notice of the plaintiff's intent to initiate litigation. This good faith written notice by the plaintiff must indicate that it is a demand pursuant to the new provisions of this bill[9], state the name, address, telephone number of the plaintiff and the name and address of the defendant, specifically describe the alleged violation, be accompanied by a copy of all documents upon which the claim is based, and describe and provide the amount of each item of actual damages demanded by the plaintiff and recoverable under FDUTPA.

The notice must be sent by certified or registered mail, return receipt requested.[10] If the defendant is a business, the notice must be sent to the business's registered agent on file with the Secretary of State. In the absence of such an agent, the notice can be sent to individuals within the corporation authorized by statute to receive service of process.[11]

If the defendant pays the claim in the notice, within 30 days, together with a surcharge of 10 percent of the alleged actual damages, then the defendant is released from further liability under the FDUTPA and is not obligated to pay attorney's fees. This surcharge is capped at $250 and is not available to the plaintiff if the demand is rejected or ignored even in a subsequent action. A payment by the defendant will be treated as being made on the date a draft or other valid instrument equivalent to payment is placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

---

[7] *See* s. 501.211, F.S.

[8] Hereinafter, this analysis will not make a distinction between purely FDUTPA actions and FDUTPA actions against motor vehicle dealers. Rather the single term FDUTPA will be used for both actions.

[9] The bill directs the notice state in substantially similar language that "[t]his notice is a demand letter under s. 501.2115, Florida Statutes." Section 501.2115(2)(a).

[10] Section 501.2115(3). If requested in the notice, these postal costs will be reimbursed if the defendant pays the claim, s. 501.2115(3).

[11] According to s. 48.081(1), F.S, process may be served against a corporation according to the following list:
(a) On the president or vice president, or other head of the corporation;
(b) In the absence of any person described in paragraph (a), on the cashier, treasurer, secretary, or general manager;
(c) In the absence of any person described in paragraph (a) or paragraph (b), on any director; or
(d) In the absence of any person described in paragraph (a), paragraph (b), or paragraph (c), on any officer or business agent residing in the state.

A defendant can avoid paying attorney's fees in a subsequent action if the defendant, within 30 days after receiving the notice, notifies the plaintiff in writing, that the plaintiff is either seeking to recover improper damages or is seeking to recover excessive damages, but the defendant offers to pay the plaintiff all properly recoverable damages plus the surcharge. This provision only offers the defendant protection if a court or arbitrator in a later action agrees. A defendant is not required to pay attorney's fees for a plaintiff who fails to comply with the notice requirements.

Where a defendant offers to or pays a plaintiff's actual damages, that action will not constitute an admission of any wrongdoing and is not admissible to prove the defendant's liability or absence of liability.[12] Moreover, such an offer or payment releases the defendant from any further liability under FDUTPA arising out of the event described in the notice. Finally, the payment of or offer to pay damages can serve as a defense in any action for damages not brought under FDUTPA against the defendant arising out of the event described in the notice.

Class Action

Class actions are similar, although the 10% surcharge is not available, and the applicable time periods are 90 days rather than 30 days.

In addition to describing a plaintiff's individual claim, a class action notice must include: the definition of the class of plaintiffs; a description of the alleged violations under FDUTPA to the class; and a statement describing and providing the amount of each item of actual damages demanded on behalf of the class.

Should the defendant agree to pay the actual class damages, the defendant must notify the plaintiff of that decision in writing within 90 days. Within 90 days after receipt of the defendant's notice, the plaintiff must file an action to enforce the agreement in court. It is then the court's responsibility to determine the fairness of the agreement to the class, to administer the agreed upon resolution of the class claim, to carry out the notification and the opt-out processes, and to award reasonable attorney's fees to the plaintiff's counsel only for actual time spent in connection with this proceeding. If the plaintiff fails to timely file this action or if the court determines that the agreement is not fair, both the notice and the defendant's response will be deemed void.

The defendant is not obligated to pay attorney's fees if, within 90 days, the defendant informs that the plaintiff that plaintiff is seeking to recover improper damages or is seeking excessive actual damages, but offers to pay the class all properly recoverable damages listed in the notice; or that the claim is not a valid, properly certified class claim, but still offers to pay the plaintiff individually all properly recoverable actual damages listed in the notice, plus the surcharge. This provision only protects the defendant if a court or arbitrator in a later action agrees.

C. SECTION DIRECTORY:

Section 1, creates s. 501.2115, which requires conditions precedent to filing an action under the Florida Deceptive and Unfair Trade Practices Act.

Section 2, provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[12] Section 90.408, F.S. provides that compromise and offers of compromise are inadmissible to prove liability or absence of liability. Specifically, "[e]vidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value." *Id.*

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

There will be a minimal nonrecurring fiscal cost to the Department of Legal Affairs in FY 2006-2007 related to rulemaking regarding a sample notice for the public's use.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

This bill creates rulemaking authority in the Department of Legal Affairs for the purpose of developing a sample claim form.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear why s. 501.2115(7)(b) provides, in lines 111-112, "The surcharge set forth in subsection (4) shall not apply," whereas s. 501.2115(7)(e)(2) provides, in line 143, " plus the surcharge described in subsection (4)." This appears to be two internally inconsistent sections within s. 501.2115(7) both dealing with class action notices.

Lines 125-128 provide that if a court determines that class action notice agreement is not fair or if a claimant fails to timely file the notice, then both the notice and the violator's response are deemed void. In such a circumstance it is unclear if the potential class will need to file a second notice with the defendant and begin the process anew or if the action may simply continue with the court.

It is unclear what, if any, is the result of a notice's failure to include certain documentation in a notice has on a subsequent proceeding. Does the failure to include certain documents with the original notice preclude their later use in a court proceeding? What too about damage amounts, can they be

increased from the original notice? In essence, is the claimant bound by the specific language of the notice in a subsequent action?

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

A bill to be entitled

An act relating to deceptive and unfair trade practices; creating s. 501.2115, F.S.; requiring a demand letter as a condition precedent to filing specified actions for deceptive and unfair trade practices; providing requirements for such demand letters; providing for delivery of such letters; providing that if specified payment of damages and premium is made within a specified period then no action may be brought against the alleged violator and the alleged violator shall not be obligated to pay any attorney's fees to the claimant; providing circumstances under which an alleged violator is excused from paying attorney's fees in specified actions; providing for specified treatment of payment of the actual damages or an offer to pay actual damages by an alleged violator; providing for application of demand letter provisions to class actions; providing for tolling statute of limitations periods for specified periods upon mailing of demand letter; excluding actions brought by the enforcing authority from the requirements of this act; requiring the Department of Legal Affairs to prepare a specified sample form and make it available to the public; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 501.2115, Florida Statutes, is created to read:

501.2115 Demand letter.--

(1) As a condition precedent to filing any action under this part or part VI of this chapter, an alleged violator must be provided with 30 days' prior written notice of the claimant's intent to initiate litigation.

(2) The notice must be completed in good faith and shall:

(a) State in substantially the following language: "This notice is a demand letter under s. 501.2115, Florida Statutes."

(b) State the name, address, and telephone number of the claimant.

(c) State the name and address of the alleged violator.

(d) Provide the date and a description of the transaction, event, or circumstance giving rise to the claim.

(e) To the extent applicable, be accompanied by all transaction documents or other documents upon which the claim is based or upon which the claimant is relying to assert the claim.

(f) Describe with specificity each alleged violation of this part or part VI of this chapter.

(g) Include a statement describing and providing the amount of each item of actual damages demanded by the claimant and recoverable under this part or part VI of this chapter.

(3) The notice required by this section must be delivered to the alleged violator by certified or registered mail, return receipt requested. Such postal costs shall be reimbursed by the alleged violator when the alleged violator pays the claim if so requested by the claimant in the notice. If the alleged violator is a business entity, notice must be sent to the business entity's registered agent on file with the Secretary of State

or, in the absence of a registered agent, anyone listed in s. 48.081(1).

(4) If, within 30 days after receipt of the notice, the alleged violator pays the claim specified in the notice, together with a surcharge of 10 percent of the alleged actual damages paid, which surcharge may not exceed $250, no action may be brought against the alleged violator, and the alleged violator shall not be obligated to pay any attorney's fees to the claimant. The surcharge shall not be available in any action brought under this part or part VI of this chapter after the demand is rejected or ignored. For purposes of this section, payment shall be treated as being made on the date a draft or other valid instrument that is equivalent to payment is placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(5) The alleged violator shall not be required to pay claimant's attorney's fees in a subsequent action brought under this part or part VI of this chapter if:

(a) The alleged violator, within 30 days after receiving the notice, notifies the claimant in writing, and a court or arbitrator in a subsequent action agrees, that the claimant is either seeking to recover damages not properly recoverable under this part or part VI of this chapter or is seeking to recover an excessive amount for such recoverable actual damages, but the violator offers to pay the claimant all damages that are properly recoverable and itemized in the notice plus the surcharge described in subsection (4); or

(b) The claimant fails to comply with this section.

(6) Payment of the actual damages or an offer to pay actual damages as set forth in subsection (5) shall:

(a) Not constitute an admission by the alleged violator of any wrongdoing.

(b) Be afforded the protection of s. 90.408.

(c) Serve to release the alleged violator from any suit or other action that could be brought under this part or part VI of this chapter arising out of or in connection with the transaction, event, or occurrence described in the notice.

(d) To the extent of the damages, inclusive of any surcharge paid by the alleged violator, serve as a defense in any action for damages not brought under this part or part VI of this chapter against the alleged violator in connection with the same set of operative facts as described in the notice.

(7) This section shall apply to class action claims, subject to the following variations:

(a) In addition to describing the claimant's individual claim as required by subsection (2), the notice shall also include:

1. The definition of the class of claimants for whom relief is sought.

2. A description of the alleged violations of this part or part VI of this chapter that have allegedly damaged the class.

3. A statement describing and providing the amount of each item of actual damages demanded by the claimant on behalf of the class under this part or part VI of this chapter.

(b) The surcharge set forth in subsection (4) shall not apply.

(c) All time periods described in this section shall be 90 days.

(d) If the alleged violator agrees to pay the actual class action damages sought in the class action notice, the alleged violator must notify the claimant of the decision in writing within 90 days. Within 90 days after receiving such notice, the claimant shall file an action to enforce the agreement, the purpose of which action is to conduct proceedings to determine the fairness of the agreement to the class, to administer the agreed-upon resolution of the class claim, to carry out the notification and the opt-out processes, and to award reasonable attorney's fees to the claimant's counsel only for actual time spent in connection with this proceeding. If the claimant fails to timely file this action or if the court determines that the agreement is not fair to the class, both the notice and the alleged violator's response shall be deemed void.

(e) The alleged violator shall not be obligated to pay claimant's attorney's fees in a subsequent action if the alleged violator notifies the claimant in writing within 90 days and a court or arbitrator in a subsequent action agrees:

1. That the claimant is seeking to recover damages for the class not properly recoverable under this part or part VI of this chapter or is seeking to recover for the class an excessive amount for such properly recoverable actual damages, but still offers to pay the class all damages properly recoverable and listed in the notice; or

2. That the claim or class is not a valid class claim and is not properly certified as a class, but still offers to pay

the claimant individually all actual damages listed in the notice that are properly recoverable by the individual claimant, plus the surcharge described in subsection (4).

(8) The applicable statute of limitations period for an action under this part or part VI of this chapter shall be tolled by the mailing of the notice required by this section for a period of 30 days for an individual claim or 90 days for a class action claim.

(9) This section does not apply to actions brought by the enforcing authority.

(10) The Department of Legal Affairs shall prepare a sample notice to comply with subsection (2) for individual claims and shall make it available to the public.

Section 2. This act shall take effect October 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 1019**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Pickens offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 501.975, Florida Statutes, is amended to read:

501.975 Definitions.--As used in this part ~~s. 501.976~~, the term ~~following terms shall have the following meanings~~:

(1) "Customer" includes a customer's designated agent.

(2) "Dealer" means a motor vehicle dealer as defined in s. 320.27, but does not include a motor vehicle auction as defined in s. 320.27(1)(c)4.

(3) "Replacement item" means a tire, bumper, bumper fascia, glass, in-dashboard equipment, seat or upholstery cover or trim, exterior illumination unit, grill, sunroof, external mirror and external body cladding. The replacement of up to three of these items does not constitute repair of damage if each item is replaced because of a product defect or damaged due to vandalism, lot damage or act of God while the new motor vehicle is under the control of the dealer and the items are

replaced with original manufacturer equipment~~, unless an item is replaced due to a crash, collision, or accident~~.

(4) "Threshold amount" means 3 percent of the manufacturer's suggested retail price of a motor vehicle or $650, whichever is less.

(5) "Vehicle" means any automobile, truck, bus, recreational vehicle, or motorcycle required to be licensed under chapter 320 for operation over the roads of Florida, but does not include trailers, mobile homes, travel trailers, or trailer coaches without independent motive power.

Section 2. Section 501.9755, Florida Statutes, is created to read:

501.9755 Unlawful acts and practices.--

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce by a dealer are unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1).

Section 3. Section 501.976, Florida Statutes, is amended to read:

501.976 Actionable, unfair, or deceptive acts or practices.--In addition to acts and practices actionable under s. 501.9755, it is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act, for a dealer to:

(1) Represent directly or indirectly that a motor vehicle is a factory executive vehicle or executive vehicle unless the ~~such~~ vehicle was purchased directly from the manufacturer or a

subsidiary of the manufacturer and the vehicle was used exclusively by the manufacturer, its subsidiary, or a dealer for the commercial or personal use of the manufacturer's, subsidiary's, or dealer's employees.

(2) Represent directly or indirectly that a vehicle is a demonstrator unless the vehicle complies with the definition of a demonstrator in s. 320.60(3).

(3) Represent the previous usage or status of a vehicle to be something that it was not, or make usage or status representations unless the dealer has correct information regarding the history of the vehicle to support the representations.

(4) Represent the quality of care, regularity of servicing, or general condition of a vehicle unless known by the dealer to be true and supportable by material fact.

(5) Represent orally or in writing that a particular vehicle has not sustained structural or substantial skin damage unless the statement is made in good faith and the vehicle has been inspected by the dealer or his or her agent to determine whether the vehicle has incurred such damage.

(6) Sell a vehicle without fully and conspicuously disclosing in writing at or before the consummation of sale any warranty or guarantee terms, obligations, or conditions that the dealer or manufacturer has given to the buyer. If the warranty obligations are to be shared by the dealer and the buyer, the method of determining the percentage of repair costs to be assumed by each party must be disclosed. If the dealer intends to disclaim or limit any expressed or implied warranty, the disclaimer must be in writing in a conspicuous manner and in lay terms in accordance with chapter 672 and the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act.

(7) Provide an express or implied warranty and fail to honor such warranty unless properly disclaimed pursuant to subsection (6).

(8) Misrepresent warranty coverage, application period, or any warranty transfer cost or conditions to a customer.

(9) Obtain signatures from a customer on contracts that are not fully completed as to all material terms at the time the customer signs or which do not reflect accurately the negotiations and agreement between the customer and the dealer. However, this subsection does not apply if, at the time of the transaction, the customer acknowledges in writing, separate from any other text, having read substantially the following notice:

STATUTORY CONSUMER NOTICE: A vehicle purchase or lease is a substantial transaction. Do not execute any sale or lease document if it is not fully completed or does not accurately reflect your agreement with the motor vehicle dealer. If you suffer any damages as a result of improper actions of the motor vehicle dealer, relief may be available to you under the laws of this state including part VI of chapter 501, Florida Statutes.

(10) Require or accept a deposit from a prospective customer prior to entering into a binding contract for the purchase and sale of a vehicle unless the customer is given a written receipt that states how long the dealer will hold the vehicle from other sale and the amount of the deposit, and clearly and conspicuously states whether and upon what conditions the deposit is refundable or nonrefundable.

(11) Add to the cash price of a vehicle as defined in s. 520.02(2) any fee or charge other than those provided in that section and in rule 3D-50.001, Florida Administrative Code. All

fees or charges permitted to be added to the cash price by rule 3D-50.001, Florida Administrative Code, must be fully disclosed to customers in all binding contracts concerning the vehicle's selling price.

(12) Alter or change the odometer mileage of a vehicle except in compliance with 49 U.S.C. s. 32704.

(13) Sell a vehicle without disclosing to the customer the actual year and model of the vehicle.

(14) File a lien against a new vehicle purchased with a check unless the dealer fully discloses to the purchaser that a lien will be filed if purchase is made by check and fully discloses to the buyer the procedures and cost to the buyer for gaining title to the vehicle after the lien is filed.

(15) Increase the price of the vehicle after having accepted an order of purchase or a contract from a buyer, notwithstanding subsequent receipt of an official price change notification. The price of a vehicle may be increased after a dealer accepts an order of purchase or a contract from a buyer if:

(a) A trade-in vehicle is reappraised because it subsequently is damaged, or parts or accessories are removed;

(b) The price increase is caused by the addition of new equipment, as required by state or federal law;

(c) The price increase is caused by the revaluation of the United States dollar by the Federal Government, in the case of a foreign-made vehicle;

(d) The price increase is caused by state or federal tax rate changes; or

(e) Price protection is not provided by the manufacturer, importer, or distributor.

(16) Advertise the price of a vehicle unless the vehicle is identified by year, make, model, and a commonly accepted trade, brand, or style name. The advertised price must include all fees or charges that the customer must pay, including freight or destination charge, dealer preparation charge, and charges for undercoating or rustproofing. State and local taxes, tags, registration fees, and title fees, unless otherwise required by local law or standard, need not be disclosed in the advertisement. When two or more dealers advertise jointly, with or without participation of the franchisor, the advertised price need not include fees and charges that are variable among the individual dealers cooperating in the advertisement, but the nature of all charges that are not included in the advertised price must be disclosed in the advertisement.

(17) Charge a customer for any predelivery service required by the manufacturer, distributor, or importer for which the dealer is reimbursed by the manufacturer, distributor, or importer.

(18) Charge a customer for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."

(19) Fail to disclose damage to a new motor vehicle, as defined in s. 319.001(8), of which the dealer had actual knowledge, if the dealer's actual cost of repairs exceeds the threshold amount, excluding replacement items.

~~In any civil litigation resulting from a violation of this section, when evaluating the reasonableness of an award of~~

~~attorney's fees to a private person, the trial court shall consider the amount of actual damages in relation to the time spent.~~

Section 4. Section 501.9765, Florida Statutes, is created to read:

501.9765 Violations involving a senior citizen or handicapped person; civil penalties; presumption.--

(1) As used in this section, the term:

(a) "Senior citizen" means a person who is 60 years of age or older.

(b) "Handicapped person" means any person who has a mental or educational impairment that substantially limits one or more major life activities.

(c) "Mental or educational impairment" means:

1. Any mental or psychological disorder or specific learning disability.

2. Any educational deficiency that substantially affects a person's ability to read and comprehend the terms of any contractual agreement entered into.

(d) "Major life activities" means functions associated with the normal activities of independent daily living such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(2) Any person who willfully uses, or has willfully used, a method, act, or practice in violation of this part, which method, act, or practice victimizes or attempts to victimize a senior citizen or handicapped person, and commits such violation when she or he knew or should have known that her or his conduct was unfair or deceptive, is liable for a civil penalty of not more than $15,000 for each such violation.

(3) Any order of restitution or reimbursement based on a violation of this part committed against a senior citizen or handicapped person has priority over the imposition of civil penalties for violations of this section.

(4) Civil penalties collected under this section shall be deposited into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs and allocated to the Department of Legal Affairs solely for the purpose of preparing and distributing consumer-education materials, programs, and seminars to benefit senior citizens and handicapped persons or to enhance efforts to enforce this section.

Section 5. Section 501.977, Florida Statutes, is created to read:

501.977 Other individual remedies.--

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part by a dealer may bring an action against the dealer in order to obtain a declaratory judgment that an act or practice violates this part and to enjoin a dealer who has violated, is violating, or is otherwise likely to violate, this part.

(2) In any action brought by a person who has suffered a loss as a result of a violation of this part, the person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.979. However, damages, fees, or costs are not recoverable under this section against a dealer who has, in good faith, engaged in the dissemination of claims of a manufacturer, distributor, importer or wholesaler without actual knowledge that doing so violates this part.

(3) In any action brought under this section, if, after the filing of a motion by the dealer, the court finds that the action is frivolous, without legal or factual merit, or brought

for the purpose of harassment, the court may, after hearing evidence as to the necessity therefor, require the party instituting the action to post a bond in the amount that the court finds reasonable to indemnify the defendant for any costs incurred, or to be incurred, including reasonable attorney's fees in defending the claim. This subsection does not apply to any action initiated by the enforcing authority.

Section 6. Section 501.978, Florida Statutes, is created to read:

501.978 Effect on other remedies.--

(1) The remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law.

(2) This part is supplemental to, and does not preempt, local consumer-protection ordinances not inconsistent with this part.

Section 7. Section 501.979, Florida Statutes, is created to read:

501.979 Attorney's fees.--

(1) In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5) and s. 501.980, the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his or her reasonable attorney's fees and costs from the nonprevailing party. When evaluating the reasonableness of an award of attorney's fees to a private person, the trial court shall consider the actual damages in relation to the time spent.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or

her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge may award the prevailing party the sum of reasonable costs incurred in the action, plus reasonable attorney's fees for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney's fees or costs becomes a part of the judgment and is subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other nonjudicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the cost thereof to the enforcing authority for the time spent in the investigation and litigation of the case, plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of the costs may be made, by stipulation of the parties a part, of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of the order or decree.

Section 8. Section 501.980, Florida Statutes, is created to read:

501.980 Demand letter.--

(1) As a condition precedent to initiating any civil litigation arising under this part, a claimant must give the dealer written notice of the claimant's intent to initiate

litigation against the dealer not less than 30 days before initiating the litigation.

(2) The notice, which must be completed in good faith, must:

(a) State that it is a demand letter under s. 501.980;

(b) State the name, address, and telephone number of the claimant;

(c) State the name and address of the dealer;

(d) Provide the date and a description of the transaction, event, or circumstance that is the basis of the claim;

(e) Describe with specificity the underlying facts and how they give rise to an alleged violation of this part;

(f) To the extent applicable, be accompanied by all transaction or other documents upon which the claim is based or upon which the claimant is relying to assert the claim;

(g) Include a statement describing and providing the amount of each item of actual damages demanded by the claimant and recoverable under this part. However, to the extent the claimant cannot in good faith quantify any item of actual damage as required, the claimant shall provide a comprehensive description of the item of damage or a formula or basis by which the dealer may calculate the damage; and

(h) Include a description of reasonable attorney's fees incurred, if any, for which reimbursement, not to exceed $500, is sought.

(3)(a) The notice of the claim must be delivered to the dealer by certified mail, return receipt requested. The postal costs shall be reimbursed to the claimant by the dealer if the dealer pays the claim and if the claimant requests reimbursement of the postal costs in the notice of claim.

(b) If the dealer is a corporate entity, the notice of claim must be sent to the registered agent of the dealer as recorded with the Department of State and, in the absence of a registered agent, any person listed in s. 48.081(1).

(4) Notwithstanding any provision under this part to the contrary, a claimant may not initiate litigation against a dealer for a claim arising under this part related to, or in connection with, the transaction or event described in the notice of claim if the dealer pays the claimant within 30 days after receiving the notice of claim:

(a) The amount requested in the demand letter as specified in paragraph (2)(g);

(b) A surcharge of 10 percent of the amount requested in the demand letter, not to exceed $500; and

(c) The attorney's fees of the claimant as specified in paragraph (2)(h), not to exceed $500.

(5)(a) Subsection (4) does not apply if the notice of claim specifies nonquantified items of damage. However, the dealer may notify the claimant in writing within 30 days after receiving the notice of claim that the dealer proposes to pay the claim with modifications. The dealer must inform the claimant that he or she has placed a value on the nonquantified items of damage and intends to pay that amount in addition to the payments described in paragraphs (4)(a) and (4)(b).

(b) The claimant must accept or reject, in writing, the offer of the dealer within 10 business days.

(c) Upon receipt of the notice of acceptance, the dealer must pay the claimant the amount set forth in the proposal within 10 business days.

(d) A claimant may not initiate litigation against the dealer for a claim under this part which is related to, or in

connection with, the transaction or event described in the notice of claim unless:

1. The dealer ignores, rejects, or fails to timely respond to the claimant's demand, or fails to pay within 10 business days the amount accepted by claimant; or

2. The claimant does not accept the proposal of the dealer.

(6) If the notice of claim includes damages that arise from the claimant not having access to a motor vehicle due to the alleged conduct of the dealer, the time set forth in subsections (4) and (5) for the dealer to respond are reduced from 30 days to 10 business days.

(7) For the purpose of this section, payment by a dealer is deemed paid on the date a draft or other valid instrument that is equivalent to payment is placed in the United States mail, or other nationally recognized carrier, in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(8) The claimant is not entitled to a surcharge in any proceeding initiated against a dealer under this part if the dealer rejects or ignores the notice of claim or the claimant rejects or ignores the dealer's proposal described in subsection (5).

(9) Notwithstanding any provision under this part to the contrary, a dealer is not required to pay the attorney's fees of the claimant in any civil action brought under this part if:

(a) The dealer, within 30 days after receiving the claimant's notice of claim, notifies the claimant in writing, and a court or arbitrator agrees, that the amount claimed is not supported by the facts of the transaction or event described in the notice of claim or by generally accepted accounting

principles, or includes items not properly recoverable under this part, but, nevertheless, offers to pay to the claimant the actual damages that are supported by the facts of the transaction or event described in the notice of claim and properly recoverable under this part, and the surcharge and attorney's fees, if any, described in subsection (4);

(b) The claimant's basis for rejecting or ignoring the dealer's proposal described in subsection (5) is not supported by the facts described in the notice of claim, generally accepted accounting principles, or the law; or

(c) The claimant fails to substantially comply with this section.

(10) This section applies to class action claims subject to the following conditions:

(a) In addition to describing the claimant's individual claim as required by subsection (2), the class action notice of claim to the dealer must also include:

1. The definition of the class of claimants for whom relief is being sought;

2. A description of the alleged violations of this part which have allegedly damaged the class; and

3. A statement describing and providing the amount of each item of actual damages demanded by the claimant on behalf of the class under this part or, if the claimant cannot in good faith quantify an item of actual damages, a comprehensive description of the item of damages and a formula or basis by which the dealer may calculate the damages.

(b) The surcharge set forth in subsection (4) does not apply.

(c) All time periods described in this section shall be 45 days in length for class actions unless further extended by a written agreement of the parties.

(d) If the dealer agrees to pay the damages demanded in the class action notice of claim, the dealer must notify the claimant in writing within 90 days after receiving the class action notice of claim. Within 90 days after receiving the dealer's notice of agreement, the claimant, on behalf of the class, must file a civil action to enforce the agreement, the purposes of which are to conduct proceedings to determine the fairness of the agreement to the class, to administer the agreed resolution of the class action, to provide for notification and opt-out procedures applicable in a class action, to ensure compliance with the rules of civil procedure, and to award reasonable attorney's fees to the claimant's counsel for actual time spent in connection with the proceeding. If the claimant fails to file the civil action within 90 days or if the court determines that the agreement is not fair to the class, the class action notice and the dealer's response are void.

(e) A dealer is not required to pay attorney's fees for the claimant in a class action proceeding if the dealer, within 45 days after receiving the class action notification, informs the claimant in writing, and a court or arbitrator in a subsequent action agrees, that:

1. The claimant is seeking to recover damages for the class which are not properly recoverable under this part or is seeking to recover damages that are not supported by the facts of the transaction or event described in the class action notice of claim or by generally accepted accounting principles, but still offers to pay the class all damages properly recoverable and listed in the notice of claim; or

2. The claim is not a valid class claim or the class is not properly certified as a class, but the dealer offers to pay all actual damages properly recoverable by the claimant under this part as an individual which are supported by the facts of the transaction or event described in the class action notice of claim, in addition to the payments described in paragraphs (4)(b) and (4)(c).

(11) Payment of the actual damages or an offer to pay actual damages as set forth in this section:

(a) Does not constitute an admission of any wrongdoing by the dealer;

(b) Is protected by s. 90.408;

(c) Serves to release the dealer from any suit, action, or other action that could be brought under this part arising out of or in connection with the transaction, event, or occurrence described in the notice of claim;

(d) Serves as a defense in any action brought by the same claimant to the extent of the damages, inclusive of any surcharge, paid by the dealer; and

(e) Serves as a defense in any subsequent action brought by any member of the class who did not opt out in connection with the same set of operative facts as described in the class action notice of claim if the action was settled on a class-wide basis.

(12) The applicable statute of limitations for an action under this part is tolled for 30 days for individual claims and 45 days for class action claims, or such other period of time as agreed to by the parties in writing, by the mailing of the notice required by this section.

(13) This section does not apply to an enforcing authority. Notwithstanding the foregoing, the Department of

Legal Affairs shall prepare a sample demand letter to incorporate the information required by subsection (2) for individual notice of claims and make it available to the public.

(14) If a claimant initiates civil litigation under this part without first complying with the requirements of this section, the court, upon a motion of a dealer, shall abate the litigation, without prejudice, until the claimant has complied with the provisions of this part.

Section 9. Subsection (8) is added to section 501.212, Florida Statutes, to read:

501.212 Application.--This part does not apply to:

(8) A claim brought by a person other than the enforcing authority against a dealer as defined in s. 501.975(2).

However, this subsection does not affect any action or remedy concerning residential tenancies covered under part II of chapter 83, nor does it prohibit the enforcing authority from maintaining exclusive jurisdiction to bring any cause of action authorized under this part.

Section 10. This act shall take effect upon becoming a law.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to deceptive and unfair trade practices; amending s. 501.975, F.S.; providing definitions for part VI of ch. 501, F.S.; creating s. 501.9755, F.S.; declaring that unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices used by motor vehicle dealers are unlawful; providing legislative intent; amending s. 501.976, F.S.; providing an exception to the requirement that a

contract be fully complete before a customer signs a motor vehicle dealer's contract; creating s. 501.9765, F.S.; providing that a motor vehicle dealer who willfully uses a method or practice that victimizes or attempts to victimize senior citizens or handicapped persons commits an unfair or deceptive trade practice; providing a civil penalty; providing for reimbursement or restitution; creating s. 501.977, F.S.; providing additional remedies against a motor vehicle dealer; creating s. 501.978, F.S.; providing that the remedies of part VI of ch. 501, F.S., are in addition to remedies otherwise available for the same conduct under state or local law and do not preempt local consumer-protection ordinances not in conflict with part VI of ch. 501, F.S.; creating s. 501.979, F.S.; providing for attorney's fees for a prevailing party; providing procedures for receiving attorney's fees; authorizing the Department of Legal Affairs or the office of the state attorney to receive attorney's fees under certain circumstances; creating s. 501.980, F.S.; requiring that, as a condition precedent to initiating civil litigation arising under part VI of ch. 501, F.S., a claimant give the motor vehicle dealer written notice of the claimant's intent to initiate litigation against the motor vehicle dealer not less than 30 days before initiating the litigation; providing for the content of the notice of claim and the method by which the notice of claim is given to the motor vehicle dealer; providing that if the claim is paid by the motor vehicle dealer within 30 days after receiving the notice of claim, together with a surcharge of 10 percent of the alleged actual damages, the claimant may not initiate litigation against the motor vehicle dealer, and the motor vehicle dealer is obligated to pay only $500 for the attorney's fees of the claimant; providing that the surcharge not exceed $500;

providing procedures for damage claims that are nonquantifiable; providing expedited procedures when the claimant is without access to a motor vehicle; providing that a claimant is not entitled to a surcharge under certain circumstances; providing that a motor vehicle dealer is not obligated to pay the claimant's attorney's fees under certain circumstances; providing that the presuit-notification procedures apply to class actions; providing that any applicable statute of limitations is tolled for 30 days for individual claims and 90 days for class action claims; providing that the act does not affect the statutory responsibilities of the Attorney General or the office of the state attorney; requiring a court to abate litigation, without prejudice, until the claimant has complied with the required procedures; amending s. 501.212, F.S.; exempting motor vehicle dealers from the provisions of part II of ch. 501, F.S.; providing an exception for the enforcing authority; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1047 Parental Relocation with a Child
SPONSOR(S): Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2184

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Future of Florida's Families Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Current law requires that a parent who has primary residential custody of a child, where the judgment awarding primary residence restricts relocation, must seek court permission for the move.

This bill creates a procedure that all primary residential parents must follow when seeking to relocate with a child or children. The primary residential parent must give 45 days notice to all persons entitled to visitation rights with the child or children. If there is no objection, the move is automatically authorized. If an objection is filed, the bill sets criteria for the court to use in determining whether to grant or deny permission to move.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower Families -- This bill may affect the process for obtaining court permission to move a minor child of an unmarried (or estranged) couple.

B. EFFECT OF PROPOSED CHANGES:

Current Law

A primary residential parent's attempt to relocate is addressed in two ways; with only one provided for in statute. When a residency restriction clause is provided in the final judgment of divorce, a framework exists in the statutes for what a court is to consider when reviewing a primary residential parent's petition for relocation. That framework, found in s. 61.13(2)(d), F.S., provides that a court is to consider the following factors to determine whether the primary residential parent should be permitted to relocate with the child:

1. Whether the move would be likely to improve the general quality of life for both the residential parent and the child.

2. The extent to which visitation rights have been allowed and exercised.

3. Whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.

4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent.

5. Whether the cost of transportation is financially affordable by one or both parties.

6. Whether the move is in the best interests of the child.[12]

Section 61.13(2)(d), F.S. is explicit that "[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent." In essence, the existing statute "imposes a fact-specific framework that allows the trial court to base a relocation decision 'on what is best for the child, even though a result may not be best for the primary residential parent seeking to relocate.'"[3]

The existing statute is effective when a petition for relocation by a primary residential parent has been filed. However, in the absence of a residency restriction clause in the final judgment, many times the

---

[1] Section 61.13(2)(d), F.S.

[2] Section 61.13(2)(d), F.S. was enacted to overrule a line of cases as this excerpt from *Berrebbi v. Clarke*, 870 So. 2d 172, 173-74 (Fla. 2d DCA 2004) explains:

> Section 61.13(2)(d) overrules a presumption previously adopted by the *Mize v. Mize*, 621 So.2d 417 (Fla.1993), and *Russenberger v. Russenberger*, 669 So.2d 1044 (Fla.1996), line of cases that a request for relocation should be favored when the request is made in good faith. *Borchard v. Borchard*, 730 So.2d 748 (Fla. 2d DCA 1999); *Flint* [*v. Fortson*], 744 So.2d 1217 [(Fla. 4th DCA 1999)]. Instead, the statute imposes a fact-specific framework that allows the trial court to base a relocation decision "on what is best for the child, even though a result may not be best for the primary residential parent seeking to relocate."

[3] *Berrebbi*, 870 So. 2d at 174 (citing *Flint v. Fortson*, 744 So.2d 1217, 1218 (Fla. 4th DCA 1999).

primary residential parent simply moves without authorization. The following excerpt from the Fourth District Court of Appeal, in *Leeds v Adamse*, 832 So.2d 125, 127-28 (Fla. 4th DCA 2002), describes this scenario which it described as a "catch 22."

> The "catch 22" scenario unfolds as follows. Absent a residency restriction clause, the custodial parent is free to move the children without the consent of, or even notice to, the non-custodial parent. A trial court is prohibited from including a residency restriction clause in a final judgment unless the custodial parent seeks to relocate. An intent to relocate is often first revealed when the move takes place. At that point, the non-custodial parent's only option is to seek a modification of custody. However, to secure a modification of custody, he or she must show a substantial change of circumstances, and that the modification will be in the best interest of the children. [Section] 61.13(1)(a) Fla. Stat (2001). Until recently, relocation of the children without notice or consent was not a substantial change of circumstances that would support modification of the custody provisions of a final judgment. The non-custodial parent is up the custody creek without the proverbial paddle.
>
> This "catch 22" scenario has been reduced by the recent amendment of section 61.13. It now provides that refusal to honor a non-custodial parent's visitation rights without just cause will support a modification of custody. But, the non-custodial parent must still show that the modification is in the best interest of the children. [Section] 61.13(4)(c)5 Fla. Stat. (2001). Boiled down to its essentials, under existing law, a custodial parent can conceal his or her intent to relocate the children, then after entry of the final judgment relocate to a place for [*sic*] enough away to effectively deny visitation to the non-custodial parent, and leave the non-custodial parent with the uphill battle.
>
> At that point, much has changed, and an element of greatly increased hostility has been injected into the case. The judge's role is transformed from a thoughtful consideration of statutory criteria before the move to a fragile balancing act. The court must consider the significant economic factors inherent in a relocation, such as the purchase/sale of a residence, rent and utility deposits, school enrollment, and many other expenditures made by the custodial parent who relocates. The court must also consider the additional disruption of the children's lives that will occur if the court orders the custodial parent to return, or, by modifying custody, orders the children to be relocated a second time, this time without the presence and support of the parent with whom the children have lived. The longer the relocated parent can delay resolution of the issue, the greater the impact on the children of an additional relocation. In many cases, consideration of these factors, particularly those relating to disruption of the children's lives, actually bolsters the position of the relocated parent. The circumstances to be reviewed have already altered the pre-existing status quo.
>
> For a non-custodial parent to be guaranteed of notification before a relocation takes place, a residency restriction clause must be in existence by agreement or order. All that an inclusion of such a provision will do to is allow the parties to either agree to the move or request leave of court to relocate. This will allow the trial court to review the factors outlined in section 61.13(2)(d), Florida Statutes (2001), in an objective and thoughtful manner instead of having to address these sensitive issues after the fact. It will prevent the infamous flights in the night that send families into the land of panic, chaos, and hostility, and which cause such disruption in the lives of children.[4]

---

[4] *Leeds v Adamse*, 832 So.2d 125, 127-28 (Fla. 4th DCA 2002)(internal citations omitted).

Effect of Bill

The bill creates s. 63.13001, F.S., to provide a mechanism for a court to determine the appropriateness of any relocation by a primary residential parent before the relocation. The bill defines the following terms:

- Change of residence address means the relocation of a child to a primary residence more than 50 miles away from his or her current primary place of residence, unless the move places the primary residence of the minor child less than 50 miles from the nonresidential parent.

- Child means any person who is under the jurisdiction of a state court pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act or is the subject of any order granting to a parent or other person any right to residential care, custody, or visitation as provided under state law.

- Court means the circuit court in an original proceeding which has proper venue and jurisdiction in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, the circuit court in the county in which either parent and the child reside, or the circuit court in which the original action was adjudicated.

- Other person means an individual who is not the parent and who, by court order, maintains the primary residence of a child or has visitation rights with a child.

- Parent means any person so named by court order or express written agreement that is subject to court enforcement or a person reflected as a parent on a birth certificate and in whose home a child maintains a primary or secondary residence.

- Person entitled to be the primary residential parent of a child means a person so designated by court order or by an express written agreement that is subject to court enforcement or a person seeking such a designation, or, when neither parent has been designated as primary residential parent, the person seeking to relocate with a child.

- Principal or primary residence of a child means the home of the designated primary residential parent. When rotating custody is in effect, each parent shall be considered to be the primary residential parent.

- Relocation means a change in the principal residence of a child for a period of 60 consecutive days or more but does not include a temporary absence from the principal residence for purposes of vacation, education, or the provision of health care for the child.

A primary residential parent must notify the other parent and every other person entitled to visitation with the child of the proposed relocation. No later than 45 days before the proposed move, the primary residential parent must file a "Certificate of Filing Notice of Intent to Relocate" ("Certificate") of the parent's intention to relocate with the child.

The Certificate must be personally served on the other parent and on every person entitled to visitation.[5] In cases where personal service is impossible, service will be permitted by publication.[6] If there is a pending action or proceeding in which service of process has already been made, service of process may occur in accordance with Rule 1.080, Florida Rules of Civil Procedure,[7] and is a valid service of the Certificate.

---

[5] The service must comply with the requirements of ch. 48, F.S..

[6] Service by publication must be in accordance with s. 49.021, F.S.

[7] Rule 1.080, Florida Rules of Civil Procedure provides for when service is required and how service is to be accomplished.

A Notice of Intent to Relocate ("Notice") must be served with the Certificate. The Notice lists the details of the proposed move, and it must provide:

- If known, a description of the location of the new residence, including the state, city, and specific physical address.
- If known, the mailing address, if not the same as the physical address.
- If known, the home telephone number of the intended new residence.
- The date of the intended move.
- A detailed statement of the specific reasons for the proposed relocation of the child. If one of the reasons for the move is based on a written job offer, that written job offer must be attached.
- A proposal for a revised post-relocation schedule of visitation with the child.
- A warning to the non-relocating parent or other person that an objection to the relocation must be made in writing, filed with the court, and served on the relocating person within 30 days after service of the Certificate along with the Notice. Without an objection the relocation will be permitted. If an objection is timely filed, the burden shifts to the parent or person seeking to relocate to initiate court proceedings to obtain court permission to relocate prior to doing so.
- The mailing address of the parent or other person seeking to relocate to which an objection should be sent.

The Notice must be signed under oath under penalty of perjury. The contents of the Notice are not privileged; however, the Notice is not initially filed with the court. Instead, the Notice is served upon the non-relocating parent and other persons entitled to visitation with the child. A primary residential parent required to give Notice, has a continuing duty to provide current and updated information in the Notice.

If a parent relocates a child without complying with the Notice procedure, that action subjects a parent to contempt and other proceedings to compel the return of the child. Further, the parent's failure to follow this procedure may be taken into account by a court in any action seeking a determination or modification of residence, custody, or visitation with the child as:

- A factor in making a determination regarding the relocation of a child.
- A factor in determining whether residence or contact, access, visitation, and time-sharing arrangements should be modified.
- A basis for ordering the temporary or permanent return of the child.
- Sufficient cause to order the parent seeking to relocate the child to pay reasonable expenses and attorney's fees incurred by the objecting party.
- For the award of reasonable attorney's fees and costs, including interim travel expenses incident to visitation or securing the return of the child.

As the Notice warns, if after 30 days after service, no written objection is filed, the relocation is deemed authorized and may occur. If an objection is filed, the objection must include the specific factual basis for seeking a prohibition of the relocation, including a statement of the amount of participation or involvement the objecting party currently has or has had in the life of the child.

The court may grant a temporary order restraining the relocation of a child. The court may also order the return of the child, if a relocation has previously taken place, or other appropriate relief. But to require such action, the court must find:

- The Notice was not timely provided.
- The child was already relocated without Notice, written agreement or court approval.
- Based upon the evidence presented at a preliminary hearing, there is a likelihood that after a final hearing the court will not approve the relocation.

On the other hand, the court may grant a temporary order permitting the relocation. But the court must find the Notice was timely provided, and the evidence presented at a preliminary hearing demonstrates that there is a likelihood that after a final hearing the court will approve the relocation.[8]
If the court issues a temporary order authorizing a relocation before a final judgment is rendered, the court may not give any weight to the temporary relocation in reaching its final decision.

If temporary relocation of a child is permitted, the court may require the relocating parent to provide reasonable security, financial or otherwise, and guarantee that the court-ordered contact with the child will not be interrupted or interfered with by the relocating parent.

No presumption will arise in favor of or against a request to relocate with the child when a primary residential parent seeks to move and the move will materially affect the current schedule of contact, access, and time-sharing with the non-relocating parent. In reaching its decision regarding a proposed temporary or permanent relocation, the court must evaluate all of the following factors:

- The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate with the child and with the non-relocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.
- The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
- The feasibility of preserving the relationship between the nonrelocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, visitation, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the nonrelocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent once he or she is out of the jurisdiction of the court.
- The child's preference, taking into consideration the age and maturity of the child.
- Whether the relocation will enhance the general quality of life for both the parent seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.
- The reasons of each parent or other person for seeking or opposing the relocation.
- The current employment and economic circumstances of each parent or other person and whether or not the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

[8] Section 61.13001(5)(b)(2); these findings must be supported by the same factual basis as would be necessary to support the permitting of relocation in a final judgment.

- That the relocation is sought in good faith, the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

- The career and other opportunities available to the objecting parent or objecting other person if the relocation occurs.

- A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of s. 39.806(1)(d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

- Any other factor affecting the best interest of the child or as set forth in s. 61.13.[9]

The parent or other person seeking to relocate has the burden of proof if an objection is filed and must then initiate a proceeding seeking court permission for relocation. The initial burden is on the parent or person wishing to relocate to prove by a preponderance of the evidence that relocation is in the best interest of the child. If that burden is met, the burden shifts to the nonrelocating parent or other person to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child.

If relocation is permitted, the court may, in its discretion, order contact with the nonrelocating parent, including access, visitation, time-sharing, telephone, Internet, web-cam, and other arrangements sufficient to ensure that the child has frequent, continuing, and meaningful contact with the nonrelocating parent or other persons. This is only if that contact is financially affordable and in the best interest of the child.

Moreover, if applicable, the court must specify how the transportation costs will be allocated between the parents and other persons entitled to contact with the child(ren). And the court may adjust the child support award, as appropriate, considering the costs of transportation and the respective net incomes of the parents in accordance with state child support guidelines.

An evidentiary hearing or nonjury trial on a pleading seeking temporary or permanent relief filed pursuant to this section must be accorded priority on the court's calendar.

The provisions of this section apply in the following manner. Before July 1, 2006, if the existing order defining custody, primary residence, and visitation or a written agreement does not expressly govern the relocation of the child. To an order, whether temporary or permanent, regarding primary residence of a child or visitation with a child issued after July 1, 2006. To any relocation or proposed relocation, whether permanent or temporary, of a child during any pending proceeding wherein residence of or visitation with a child is an issue.

In situations involving domestic violence, a court may limit the amount of identifying information. On a finding by the court, pursuant to Rule 2.051(c), Florida Rules of Judicial Administration,[10] that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the required identifying information in conjunction with a proposed relocation of the child, the court may ex parte:

- Order that the specific residence address and telephone number, including the identity or location of any domestic violence shelter, of the child, the parent, or other person and other identifying information must not be disclosed in the notice, pleadings, other documents filed in the proceeding, or the final order, except for an in camera disclosure;

---

[9] Section 61.13, F.S. pertains to custody and support of children. .
[10] Rule 2.051(c), Florida Rules of Judicial Administration provides for confidentiality of court records.

- Order the Notice be modified to the extent necessary to protect confidentiality and the health, safety, or liberty of a parent, other person, or child;

- Impose any other remedial action that the court considers necessary to facilitate the legitimate needs of the parties and the best interest of the child; or

- At the request of a parent, other person, or child, appoint an attorney ad litem upon whom the objection to the Notice may be served.

To the extent that a provision of this section conflicts with an existing order or enforceable written agreement signed by both parents, this section does not apply to the terms of that order or agreement that govern relocation of the child or a change in the principal residence address of a parent.

C. SECTION DIRECTORY:

Section 1 creates s. 61.13001 relating to parental relocation of children.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Public Records Law

Article I, s. 24(a), of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of the government.

In general, "all court records are presumed open."[11] Subject to the rulemaking power of the Florida Supreme Court, as provided by art. V, s. 2, of the Florida Constitution, the public shall have access to all records of the judicial branch of government and its agencies, except as otherwise provided.[12] Various court records are presently deemed confidential by court rule, by Florida Statutes, and by prior case law of the state.[13]

The Legislature may provide for the exemption of records from the requirements of Art. I, s. 24, by passage of a general law. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is also addressed in s. 119.07(1), F.S., which guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act of 1995, s. 119.15, F.S., provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet one of the following public purposes: 1) allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2) protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety, although only the individual's identity may be exempted under this provision; or 3) protecting trade or business secrets.

It appears that the portion of this bill dealing with the disclosure requirements in the case of domestic violence, s. 61.13001(3), may be an attempt to create a public records exception outside of the requirements of the Constitution. Specifically, the bill provides that upon a finding by the court, that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the required identifying information in conjunction with a proposed relocation of the child, the court may ex parte order that the specific residence address and telephone number, including the identity or location of any domestic violence shelter, of the child, the parent, or other person and other identifying information not be disclosed in the notice, pleadings, other documents filed in the proceeding, or the final order, except for an in camera disclosure.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section (6) appears to be in conflict with s. 61.13(2)(d), F.S., which also gives criteria regarding parental relocation of a child.

The bill defines a number of terms "as used in this section, unless the context otherwise requires." It is unclear why the language "unless the context otherwise requires" is included.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

---

[11] *Times Publishing Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995).
[12] *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*, 651 So. 2d 1185, 1188 (Fla. 1995).
[13] *Id.* at 1189; Rule of Judicial Administration 2.051(c)(9).

A bill to be entitled

An act relating to parental relocation with a child; creating s. 61.13001, F.S.; providing definitions; providing for notification of certain persons of the intent to relocate the child and providing procedures therefor; requiring certain information to be provided on a Notice of Intent to Relocate; providing procedures for objecting to the relocation of a child; limiting disclosure of certain information relating to cases of domestic violence; providing for content of an objection to relocation; authorizing the court to grant a temporary order restraining the relocation of a child under certain circumstances; prohibiting certain presumptions and requiring certain factors to be evaluated by the court with regard to relocation of a child; assigning the burden of proof in cases of relocation of a child; authorizing the court to order certain contact with the child by the nonrelocating party; granting priority for certain hearings and trials under s. 61.13001, F.S.; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 61.13001, Florida Statutes, is created to read:

61.13001 Parental relocation with a child.--

(1) DEFINITIONS.--As used in this section, unless the context otherwise requires:

(a) "Change of residence address" means the relocation of a child to a primary residence more than 50 miles away from his or her current primary place of residence, unless the move places the primary residence of the minor child less than 50 miles from the nonresidential parent.

(b) "Child" means any person who is under the jurisdiction of a state court pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act or is the subject of any order granting to a parent or other person any right to residential care, custody, or visitation as provided under state law.

(c) "Court" means the circuit court in an original proceeding which has proper venue and jurisdiction in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, the circuit court in the county in which either parent and the child reside, or the circuit court in which the original action was adjudicated.

(d) "Other person" means an individual who is not the parent and who, by court order, maintains the primary residence of a child or has visitation rights with a child.

(e) "Parent" means any person so named by court order or express written agreement that is subject to court enforcement or a person reflected as a parent on a birth certificate and in whose home a child maintains a primary or secondary residence.

(f) "Person entitled to be the primary residential parent of a child" means a person so designated by court order or by an express written agreement that is subject to court enforcement or a person seeking such a designation, or, when neither parent

has been designated as primary residential parent, the person seeking to relocate with a child.

(g) "Principal or primary residence of a child" means the home of the designated primary residential parent. When rotating custody is in effect, each parent shall be considered to be the primary residential parent.

(h) "Relocation" means a change in the principal residence of a child for a period of 60 consecutive days or more but does not include a temporary absence from the principal residence for purposes of vacation, education, or the provision of health care for the child.

(2) NOTICE OF INTENT TO RELOCATE WITH A CHILD.--A parent who has the right to primary residence of the child shall notify the other parent and every other person entitled to visitation with the child of the proposed relocation of the child's principal residence.

(a) Verified confirmation by written notice on a form entitled "Certificate of Filing Notice of Intent to Relocate" of the proposed intent of the primary residential parent to relocate with the child must be filed with the court no later than the 45th day before the date of the proposed relocation and be personally served pursuant to chapter 48 on the other parent and on every other person entitled to visitation with the child, together with the Notice of Intent to Relocate. When personal service of process cannot be had, service of process shall be by publication, in accordance with s. 49.021. If there is a pending action or proceeding in which service of process has already been made, service of process shall occur in accordance with

Rule 1.080, Florida Rules of Civil Procedure, and is a valid service of the Certificate of Filing Notice of Intent to Relocate.

(b) The Notice of Intent to Relocate shall be served with the Certificate of Filing Notice of Intent to Relocate and shall be fully and completely answered. The following information must be included with the Notice of Intent to Relocate and signed under oath under penalty of perjury:

1. A description of the location of the intended new residence, including the state, city, and specific physical address, if known.

2. The mailing address, if not the same as the physical address, if known.

3. The home telephone number of the intended new residence, if known.

4. The date of the intended move or proposed relocation.

5. A detailed statement of the specific reasons for the proposed relocation of the child. If one of the reasons is based upon a job offer which has been reduced to writing, that written job offer must be attached to the Notice of Intent to Relocate.

6. A proposal for a revised postrelocation schedule of visitation with the child.

7. A warning to the nonrelocating parent or other person that an objection to the relocation must be made in writing, filed with the court, and served on the parent or other person seeking to relocate within 30 days after service of the Certificate of Filing Notice of Intent to Relocate along with the Notice of Intent to Relocate, or the relocation shall be

permitted. If the objection is timely filed, the burden shifts to the parent or person seeking to relocate to initiate court proceedings to obtain court permission to relocate prior to doing so.

8. The mailing address of the parent or other person seeking to relocate to which the objection filed under subsection (4) to the Notice of Intent to Relocate should be sent.

The contents of the Notice of Intent to Relocate are not privileged. For purposes of encouraging amicable resolution of the relocation issue, the Notice of Intent to Relocate shall initially not be filed with the court but instead served upon the nonrelocating parent, other person, and every other person entitled to visitation with the child and a copy thereof shall be maintained by the parent or other person seeking to relocate.

(c) A person required to give notice of a proposed relocation or change of residence address under this section has a continuing duty to provide current and updated information required by this section when that information becomes known.

(d) The act of relocating the child after failure to comply with the notice of intent to relocate procedure described in this subsection subjects the party in violation thereof to contempt and other proceedings to compel the return of the child and may be taken into account by the court in any initial or postjudgment action seeking a determination or modification of residence, custody, or visitation with the child as:

1. A factor in making a determination regarding the relocation of a child.

2. A factor in determining whether residence or contact, access, visitation, and time-sharing arrangements should be modified.

3. A basis for ordering the temporary or permanent return of the child.

4. Sufficient cause to order the parent or other person seeking to relocate the child to pay reasonable expenses and attorney's fees incurred by the party objecting to the relocation.

5. For the award of reasonable attorney's fees and costs, including interim travel expenses incident to visitation or securing the return of the child.

(e) If the parent or other person receiving the Notice of Intent to Relocate does not, within 30 days after service of the notice, file a written objection, the relocation is automatically deemed authorized and may occur.

(3) DISCLOSURE REQUIREMENTS INVOLVING DOMESTIC VIOLENCE.--On a finding by the court, pursuant to Rule 2.051(c), Florida Rules of Judicial Administration, that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the required identifying information in conjunction with a proposed relocation of the child, the court may ex parte:

(a) Order that the specific residence address and telephone number, including the identity or location of any domestic violence shelter, of the child, the parent, or other

person and other identifying information shall not be disclosed in the notice, pleadings, other documents filed in the proceeding, or the final order, except for an in camera disclosure;

(b) Order that the notice requirements provided in this section be modified to the extent necessary to protect confidentiality and the health, safety, or liberty of a parent, other person, or child;

(c) Impose any other remedial action that the court considers necessary to facilitate the legitimate needs of the parties and the best interest of the child; or

(d) At the request of a parent, other person, or child, appoint an attorney ad litem upon whom the objection to the Notice of Intent to Relocate may be served.

(4) CONTENT OF OBJECTION TO RELOCATION.--The objection seeking to prevent the relocation of a child shall be verified and served within 30 days after service of the Notice of Intent to Relocate according to the Florida Rules of Civil Procedure and shall include the specific factual basis supporting the reasons for seeking a prohibition of the relocation, including a statement of the amount of participation or involvement the objecting party currently has or has had in the life of the child.

(5) TEMPORARY ORDER.--

(a) The court may grant a temporary order restraining the relocation of a child or ordering the return of the child, if a relocation has previously taken place, or other appropriate remedial relief, if the court finds:

1. The required notice of a proposed relocation of a child was not provided in a timely manner.

2. The child already has been relocated without notice or written agreement of the parties or without court approval.

3. From an examination of the evidence presented at the preliminary hearing that there is a likelihood that upon final hearing the court will not approve the relocation of the primary residence of the child.

(b) The court may grant a temporary order permitting the relocation of the child pending final hearing, if the court:

1. Finds that the required Notice of Intent to Relocate was provided in a timely manner.

2. Finds from an examination of the evidence presented at the preliminary hearing that there is a likelihood that on final hearing the court will approve the relocation of the primary residence of the child, which findings must be supported by the same factual basis as would be necessary to support the permitting of relocation in a final judgment.

(c) If the court has issued a temporary order authorizing a party seeking to relocate or move a child before a final judgment is rendered, the court may not give any weight to the temporary relocation as a factor in reaching its final decision.

(d) If temporary relocation of a child is permitted, the court may require the person relocating the child to provide reasonable security, financial or otherwise, and guarantee that the court-ordered contact with the child will not be interrupted or interfered with by the relocating party.

(6) NO PRESUMPTION; FACTORS TO DETERMINE CONTESTED RELOCATION.--No presumption shall arise in favor of or against a request to relocate with the child when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact, access, and time-sharing with the nonrelocating parent or other person. In reaching its decision regarding a proposed temporary or permanent relocation, the court shall evaluate all of the following factors:

(a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate with the child and with the nonrelocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

(c) The feasibility of preserving the relationship between the nonrelocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, visitation, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the nonrelocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent once he or she is out of the jurisdiction of the court.

(d) The child's preference, taking into consideration the age and maturity of the child.

(e) Whether the relocation will enhance the general quality of life for both the parent seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

(f) The reasons of each parent or other person for seeking or opposing the relocation.

(g) The current employment and economic circumstances of each parent or other person and whether or not the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

(h) That the relocation is sought in good faith, the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

(i) The career and other opportunities available to the objecting parent or objecting other person if the relocation occurs.

(j) A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of s. 39.806(1)(d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(k) Any other factor affecting the best interest of the child or as set forth in s. 61.13.

(7) BURDEN OF PROOF.--The parent or other person wishing to relocate has the burden of proof if an objection is filed and must then initiate a proceeding seeking court permission for relocation. The initial burden is on the parent or person wishing to relocate to prove by a preponderance of the evidence that relocation is in the best interest of the child. If that burden of proof is met, the burden shifts to the nonrelocating parent or other person to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child.

(8) ORDER REGARDING RELOCATION.--If relocation is permitted:

(a) The court may, in its discretion, order contact with the nonrelocating parent, including access, visitation, time-sharing, telephone, Internet, web-cam, and other arrangements sufficient to ensure that the child has frequent, continuing, and meaningful contact, access, visitation, and time-sharing with the nonrelocating parent or other persons, if contact is financially affordable and in the best interest of the child.

(b) If applicable, the court shall specify how the transportation costs will be allocated between the parents and other persons entitled to contact, access, visitation, and time-sharing and may adjust the child support award, as appropriate, considering the costs of transportation and the respective net incomes of the parents in accordance with state child support guidelines.

(9) PRIORITY FOR HEARING OR TRIAL.--An evidentiary hearing or nonjury trial on a pleading seeking temporary or permanent

relief filed pursuant to this section shall be accorded priority on the court's calendar.

(10) APPLICABILITY.--

(a) The provisions of this section apply:

1. Before July 1, 2006, if the existing order defining custody, primary residence, and visitation or a written agreement does not expressly govern the relocation of the child.

2. To an order, whether temporary or permanent, regarding primary residence of a child or visitation with a child issued after July 1, 2006.

3. To any relocation or proposed relocation, whether permanent or temporary, of a child during any pending proceeding wherein residence of or visitation with a child is an issue.

(b) To the extent that a provision of this section conflicts with an existing order or enforceable written agreement signed by both parents, this section does not apply to the terms of that order or agreement that govern relocation of the child or a change in the principal residence address of a parent.

Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 1047**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Stargel offered the following:

Amendment (with title amendments)

Remove line(s) 24-189 and insert:

Section 1. Paragraph (d) of subsection (2) of section 61.13, Florida Statutes, is amended to read:

61.13 Custody and support of children; visitation rights; power of court in making orders.--

(2)

~~(d) No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent. In making a determination as to whether the primary residential parent may relocate with a child, the court must consider the following factors:~~

~~1. Whether the move would be likely to improve the general quality of life for both the residential parent and the child.~~

~~2. The extent to which visitation rights have been allowed and exercised.~~

~~3. Whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.~~

~~4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent.~~

~~5. Whether the cost of transportation is financially affordable by one or both parties.~~

~~6. Whether the move is in the best interests of the child~~.

Section 2. Section 61.13001, Florida Statutes, is created to read:

61.13001 Parental relocation with a child.--

(1) DEFINITIONS.--As used in this section:

(a) "Change of residence address" means the relocation of a child to a primary residence more than 50 miles away from his or her current primary place of residence, unless the move places the primary residence of the minor child less than 50 miles from the nonresidential parent.

(b) "Child" means any person who is under the jurisdiction of a state court pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act or is the subject of any order granting to a parent or other person any right to residential care, custody, or visitation as provided under state law.

(c) "Court" means the circuit court in an original proceeding which has proper venue and jurisdiction in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, the circuit court in the county in which either parent and the child reside, or the circuit court in which the original action was adjudicated.

(d) "Other person" means an individual who is not the parent and who, by court order, maintains the primary residence of a child or has visitation rights with a child.

(e) "Parent" means any person so named by court order or express written agreement that is subject to court enforcement or a person reflected as a parent on a birth certificate and in whose home a child maintains a primary or secondary residence.

(f) "Person entitled to be the primary residential parent of a child" means a person so designated by court order or by an express written agreement that is subject to court enforcement or a person seeking such a designation, or, when neither parent has been designated as primary residential parent, the person seeking to relocate with a child.

(g) "Principal or primary residence of a child" means the home of the designated primary residential parent. For purposes of this section only, when rotating custody is in effect, each parent shall be considered to be the primary residential parent.

(h) "Relocation" means a change in the principal residence of a child for a period of 60 consecutive days or more but does not include a temporary absence from the principal residence for purposes of vacation, education, or the provision of health care for the child.

(2) NOTICE OF INTENT TO RELOCATE WITH A CHILD.--A parent who is entitled to primary residence of the child shall notify the other parent, and every other person entitled to visitation with the child, of a proposed relocation of the child's principal residence. The form of notice shall be according to this section:

(a) The parent seeking to relocate shall prepare a Notice of Intent to Relocate. The following information must be

included with the Notice of Intent to Relocate and signed under oath under penalty of perjury:

1. A description of the location of the intended new residence, including the state, city, and specific physical address, if known.

2. The mailing address of the intended new residence, if not the same as the physical address, if known.

3. The home telephone number of the intended new residence, if known.

4. The date of the intended move or proposed relocation.

5. A detailed statement of the specific reasons for the proposed relocation of the child. If one of the reasons is based upon a job offer which has been reduced to writing, that written job offer must be attached to the Notice of Intent to Relocate.

6. A proposal for a revised postrelocation schedule of visitation with the child.

7. Substantially the following statement, in all capital letters and in the same or larger font size than the remainder of the notice:

AN OBJECTION TO THE PROPOSED RELOCATION MUST BE MADE IN WRITING, FILED WITH THE COURT, AND SERVED ON THE PARENT OR OTHER PERSON SEEKING TO RELOCATE WITHIN 30 DAYS AFTER SERVICE OF THIS NOTICE OF INTENT TO RELOCATE. IF YOU FAIL TO TIMELY OBJECT TO THE RELOCATION, THE RELOCATION WILL BE ALLOWED WITHOUT FURTHER NOTICE AND WITHOUT A HEARING.

8. The mailing address of the parent or other person seeking to relocate to which the objection filed under

subsection (4) to the Notice of Intent to Relocate should be sent.

The contents of the Notice of Intent to Relocate are not privileged. For purposes of encouraging amicable resolution of the relocation issue, a copy of the Notice of Intent to Relocate shall initially not be filed with the court but instead served upon the nonrelocating parent, other person, and every other person entitled to visitation with the child and the original thereof shall be maintained by the parent or other person seeking to relocate.

(b) The parent seeking to relocate shall also prepare a Certificate of Filing Notice of Intent to Relocate. The certificate shall certify the date that the Notice of Intent to Relocate was served on the other parent and on every other person entitled to visitation with the child.

(c) The Notice of Intent to Relocate, and the Certificate of Filing Notice of Intent to Relocate, shall be served on the other parent and on every other person entitled to visitation with the child. Where there is a pending court action regarding the child, service of process may be according to court rule. Otherwise, service of process shall be according to chapters 48 and 49.

(d) A person giving notice of a proposed relocation or change of residence address under this section has a continuing duty to provide current and updated information required by this section when that information becomes known.

(e) If the other parent and any other person entitled to visitation with the child fails to timely file an objection, the relocation shall be allowed and the court shall enter an order.

If an objection is timely filed, the burden shifts to the parent or person seeking to relocate to initiate court proceedings to obtain court permission to relocate prior to doing so.

(f) The act of relocating the child after failure to comply with the notice of intent to relocate procedure described in this subsection subjects the party in violation thereof to contempt and other proceedings to compel the return of the child and may be taken into account by the court in any initial or postjudgment action seeking a determination or modification of residence, custody, or visitation with the child as:

1. A factor in making a determination regarding the relocation of a child.

2. A factor in determining whether residence or contact, access, visitation, and time-sharing arrangements should be modified.

3. A basis for ordering the temporary or permanent return of the child.

4. Sufficient cause to order the parent or other person seeking to relocate the child to pay reasonable expenses and attorney's fees incurred by the party objecting to the relocation.

5. For the award of reasonable attorney's fees and costs, including interim travel expenses incident to visitation or securing the return of the child.

(3) RELATION TO PUBLIC RECORDS LAWS.--If the parent or other person seeking to relocate a child, or if the child, is entitled to prevent disclosure of location information pursuant to any public records exemption applicable to that person, the court may enter any order necessary to modify the disclosure

requirements of this section in compliance with the public records exemption.

(4) CONTENT OF OBJECTION TO RELOCATION.--An objection seeking to prevent the relocation of a child shall be verified and served within 30 days after service of the Notice of Intent to Relocate. The objection shall include the specific factual basis supporting the reasons for seeking a prohibition of the relocation, including a statement of the amount of participation or involvement the objecting party currently has or has had in the life of the child.

========== T I T L E A M E N D M E N T ==========

Remove line(s) 3 and insert:

amending s. 61.13, F.S.; deleting standards for determining whether to allow a primary residential parent to move a child; creating s. 61.13001, F.S.; providing definitions;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1141 Conveyances of Land
SPONSOR(S): Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1434

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Economic Development, Trade & Banking Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

An Individual Retirement Account ("IRA") is an investment tool that permits qualifying individuals to save and invest for retirement, with certain federal income tax advantages. Although IRAs have long been able to invest in real estate, it was not until recently that there has been significant interest in placing real estate investments into an IRA. Current Florida law is unclear as to how an IRA can take title to real property.

The bill specifies how retirement investment plans, such as IRAs and other qualified plans, may accept, hold, and transfer title to real property.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- This bill will provide an individual with additional investment flexibility for administers of individual retirement accounts.

Safeguard individual liberty -- This bill increases the options of an individual regarding the conduct of his or her own affairs in the retirement arena.

B. EFFECT OF PROPOSED CHANGES:

Background[1]

The Employee Benefit Research Institute estimates there is in excess of $12 billion dollars in retirement assets currently in this country. Individual Retirement Accounts (IRAs) and other qualified plans are the second most popular type of account per household; behind the family checking account. Normally, IRAs and qualified plans are creatures of the Internal Revenue Code, and as such, are governed primarily by federal law and are only affected by state law within a limited scope. The interface between federal governance of IRAs and qualified plans, and state real property laws, creates an issue that falls within such a limited scope.

Investing an IRA in real estate is legal pursuant to the federal tax code. In the early days of IRAs, the only place that an IRA owner could go to invest an IRA in real estate or another type of alternative investment was a traditional trust company. If you could meet the minimum account size, which used to be at least $300,000 of investable assets, then the bank might be willing to accommodate the IRA owner's investment preferences. Now there is a proliferation of IRA providers who specialize in nothing but self-directed IRAs.[2] Many of them have minimum account sizes that are as low as the annual IRA contribution limits. These have become available to the average investor and, as such, are gaining a lot of press. There have always been rules to be followed and pitfalls for the unwary.

The IRS Rules

IRAs are created under ss. 408 and 408A of the Internal Revenue Code.[3] IRAs can be created by contribution subject to annual dollar limits, or by rollover from a qualified plan. Section 408 requires a written agreement containing certain required provisions.

The IRS has issued forms 5305 and 5305A as Model IRA Agreements. Form 5305A is clear that despite the fact that the IRA owner may direct investments and retain most "traditional" powers that might otherwise create a passive trust, such direction by the IRA owner will not cause the assets of the IRA to be treated as owned by the IRA owner. All IRAs are required to be held by a trustee or custodian approved by the IRS to hold IRA assets. The IRA owner cannot normally take out distributions prior to age 59 ½ without a penalty, and except in the case of a Roth IRA,[4] must start

---

[1] The bulk of this analysis is derived from materials graciously supplied by the Real Property Probate & Trust Law Section of the Florida Bar.

[2] "What is a self-directed IRA? It's simply an Individual Retirement Account established with a broker instead of a mutual fund or a bank. A self-directed IRA enables you to buy and sell individual stocks. As a result, you make the investment decisions instead of someone else, such as the manager of a mutual fund." *Self-Directed IRAs*, (last visited Mar. 9, 2006) <http://www.fool.com/foolu/askfoolu/1999/askfoolu990714.htm>.

[3] 26 U.S.C. ss. 408, 408A.

[4] "The Roth IRA provides no deduction for contributions, but instead provides a benefit that isn't available for any other form of retirement savings: if you meet certain requirements, all earnings are tax free when you or your beneficiary withdraw them. Other benefits include avoiding the early distribution penalty on certain withdrawals, and avoiding the

taking distributions out by April 1st of the year after the year in which they turn 70½. No one has rights in an IRA during the lifetime of the IRA owner except the IRA owner, and there is no such thing as an irrevocable beneficiary designation during lifetime because the IRA must always belong to the individual it was established for during the lifetime of that individual.

Qualified plans[5] have rules that are basically the same as those for IRAs. There are penalties for withdrawal before the appropriate age, and in some cases withdrawals are prohibited until retirement or separation from service. All plans will have a written agreement, a trustee and a plan administrator; but it is important to note that some plans allow the participant to direct investments within their account.

The Prohibited Transaction Rules

There are additional rules for alternative investing with IRAs. Section 4975 of the Internal Revenue Code deals with prohibited transactions, and the main focus of this section is self-dealing.[6] If a transaction within an IRA is deemed prohibited, it can result in the disqualification of the entire account as of the first day of the tax year within the year that the transaction occurred. This can result in unexpected income tax liability, as well as penalties for early distribution if the IRA owner is under 59½. Although there is no place in the Internal Revenue Code that defines permissible investments, s. 4975 addresses what is prohibited, subject to exceptions:[7]

- the sale, exchange, or leasing of any property between an IRA and any disqualified person;
- the lending of money or other extensions of credit between an IRA and any disqualified person;
- the furnishing of goods, services, or facilities between any disqualified person and an IRA;
- the transfer to any disqualified person or use by any disqualified person (or for the disqualified person's benefit) of the income or assets of an IRA; or
- the receipt by any Disqualified Person of any consideration in connection with a transaction involving my IRA.

A "Disqualified Person" as defined under Internal Revenue Code s. 4975 includes, but is not limited to, the following:[8]

- the IRA owner;
- the IRA owner's spouse;
- the IRA beneficiary;
- the IRA owner's ancestors and lineal descendants;
- spouses of the IRA owner's lineal descendants;
- anyone providing services to the IRA, including the IRA Custodian and any investment managers or advisors;
- any corporation, partnership, trust or estate in which the IRA owner individually has a 50% or greater interest.

Provided that an IRA does not engage in a prohibited transaction, alternative types of investments will not disqualify the account and will allow the IRA owner to enjoy tax-deferred growth.

There are additional pitfalls which involve possible Unrelated Business Income Tax ("UBTI"). Retirement plan income that is generated from a trade or business regularly carried on by such account that is not substantially related to its tax-exempt purpose could be subject to UBTI, which is ordinary

---

need to take minimum distributions after age 70½." *Roth IRA 101*, (last visited Mar. 9, 2006) <http://www.fairmark.com/rothira/roth101.htm>.

[5] A qualified plan is established by an employer to provide retirement benefits for employees and their beneficiaries." *401(k) and Qualified Plans: Introduction*, (last visited Mar. 9, 2006) <http://www.investopedia.com/university/retirementplans/qualifiedplan/>.

[6] 26 U.S.C. s. 4975.

[7] 26 U.S.C. s. 4975(c)(1).

[8] 26 U.S.C. s. 4975(e)(2).

income at the trust tax rate, payable by the IRA account. Leveraging of real estate can create Unrelated Debt-Financed Income ("UDFI").

Current law

Under common law, an IRA meets the simplest definition of a trust, insofar as it is required that one person hold property for the benefit of another. The trustee or custodian must generally be a financial institution, unless the trustee can demonstrate to the IRS that it is capable of administering an IRA. Although the IRS considers all IRA custodians to be trustees as well, most IRA agreements offer a choice of some sort of institutionally managed product ("bank-managed") or what is referred to as a "self-directed" account. In the bank-managed product, the IRA owner is asked to select an investment objective and then allows the institution to make investment decisions and trade on the account based upon the investment objective established by the IRA owner. In contrast, a self-directed account will have all of the investments chosen by the IRA owner. Sometimes self-directed IRA accounts will be invested in traditional stocks and bonds because perhaps the IRA owner has the skill and experience to pick and choose the investments of the account. In other situations, these accounts are invested in alternative types of investments, such as LLCs, limited partnerships, mortgage receivables, promissory notes, or real property. On rare occasions, it is possible to find an alternative investment within a bank-managed IRA because the IRA owner has instructed the trustee or custodian to purchase and/or retain the asset, but it is important to note that alternative investments are not products traditionally sold to IRA owners within the context of a bank-managed IRA relationship.

Section 408(h) of the Internal Revenue Code expressly states that IRA custodial accounts are treated as IRA trusts so long as the assets of the account are held by a bank, trust company or other specified entity, and that an IRA custodian is treated as a trustee for all Code purposes. In the event that federal taxes (UBIT or UDFI) are imposed on an IRA, the IRA is taxed at the trust tax rate.

The bill seeks to clarify how title is taken in regard to self-directed IRAs. Several title companies have taken the position that if the IRA has a custodian as opposed to a trustee, the IRA is no more than a passive trust under the Statute of Uses,[9] and therefore the title cannot vest in the custodian or the

---

[9] "The Statute of Uses was enacted in 1535 to remedy the problems caused by dual legal and equitable ownership of land. Equitable ownership had arisen as a means of avoiding the legal requirements of land transfer and the feudal incidents of legal land ownership. The statute provided that anyone with beneficial ownership of land should henceforth be deemed to be the legal owner." *Chase Fed. Sav. And Loan Ass'n. v. Schreiber*, 479 So. 2d 90, 97 (Fla. 1986).

Florida's version of the Statute of Uses, in s. 689.09, F.S., provides:

> By deed of bargain and sale, or by deed of lease and release, or of covenant to stand seized to the use of any other person, or by deed operating by way of covenant to stand seized to the use of another person, of or in any lands or tenements in this state, the possession of the bargainor, releasor or covenantor shall be deemed and adjudged to be transferred to the bargainee, releasee or person entitled to the use as perfectly as if such bargainee, releasee or person entitled to the use had been enfeoffed by livery of seizin of the land conveyed by such deed of bargain and sale, release or covenant to stand seized; provided, that livery of seizin can be lawfully made of the lands or tenements at the time of the execution of the said deeds or any of them.

In other words,

> In Florida, a modified version of the early English common-law statute of uses is in effect. The statute operates, when a conveyance of land to a trustee merely creates a dry, naked, passive trust, no active duties being imposed on the trustee, to vest both legal and equitable title in the beneficiary. The beneficiary becomes seised of the legal estate, and the statute of uses is said to "execute the trust." Similarly, when no intention to the contrary appears, an active trust will not be continued beyond the purposes of its creation as set forth in the trust instrument. When these purposes are accomplished, the trust estate ceases to exist and the trustee's title becomes extinct. The interest given by the operation of the statute of uses will be as effective as that which would be passed by the trustee's deed, except that the latter may make the grantee's chain of title clearer.

account and would vest in the IRA owner. Such a position could have a negative impact in certain retirement investors.

On the surface one would assume that qualified plans would not be potentially impacted by this interpretation because they require a trust agreement; however, depending upon the document, if the plan allows the participant to direct the investments, there is the potential that a similar result might occur under current state law within a plan context.

Currently the only exception to the Statute of Uses that allows a custodian to take title is found in the Florida Uniform Gift to Minors Act (s. 710.111(1)(e), F.S. There has never been a specific method for taking title to real estate in IRAs or qualified plans prescribed in the Florida Statutes, and similarly there is not currently an exception for same under the Statute of Uses.

Effect of bill

The bill would carve out an exception for IRAs and Qualified Plans and prescribe the correct manner in which title should be taken to real property purchased within these accounts. The bill is not determinative as to whether an IRA is considered a trust under state law, but rather provides a manner for taking title by creating an exception to the Statute of Uses.

The bill provides clarification as to taking title to real property in IRAs and qualified plans by covering all title taken in a manner consistent with the Statute of Uses, whether previously recorded or not, setting forth a template for vesting title to IRA custodians and trustees as well as Qualified Plan custodians and trustees. The bill grants powers to the custodian or trustee and allows further disposition of the property by the custodian or trustee without the joinder of the beneficiary, except in the case of a revocation or termination.[10] This presumes that the custodian or trustee will obtain whatever type of authorization they need from the IRA owner or qualified plan participant subject to the terms of the contractual agreement between the parties.

The bill allows third parties to rely on the powers of the custodian or trustee regardless of whether the powers clause is recorded on the deed, and third parties have no duty to inquire as to the qualifications of the trustee or custodian.[11] Title conveyed under this section by a custodian or trustee will be taken free and clear of the claims of the IRA owner, plan participant or beneficiary.[12] The bill also provides that if notice of revocation or termination of an IRA or qualified plan is recorded, any disposition or encumbrance of such property will be executed by the custodian or trustee and will require the joinder of the IRA owner or plan participant, provides that the standard of care for a custodian or trustee will be that observed by a prudent person dealing with property of another and does not impose fiduciary duties on a custodian that they would not otherwise bear, but despite the remedial nature of the statute will not relieve a custodian or trustee for breach of a contractual agreement with the IRA owner or plan participant.[13]

Further, the bill provides that when a provision is recorded that declares the interest to be personal property, that provision will be controlling for state law purposes, defines IRAs and qualified plans pursuant to the Internal Revenue Code, and defines beneficiaries to only be applicable when the IRA owner or qualified plan participant is deceased. It specifically excludes transfers under this section from the Statute of Uses,[14] and proposes that this section will be remedial in nature and should be given liberal interpretation.[15]

C. SECTION DIRECTORY:

55A Fla. Jur. 2d, Trusts, s. 6.
[10] Section 689.072(2).
[11] Section 689.072(3).
[12] Section 689.072(4).
[13] Section 689.072(6).
[14] Section 689.072(9)(b).
[15] Section 689.072(10).

Section 1 creates s. 689.072, which carves out an exception for IRAs and Qualified Plans and prescribes the correct manner in which title should be taken to real property purchased within these accounts.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It appears the language on line 54 is unclear. Possibly the first "the" in that line should be changed to a "that."

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

A bill to be entitled

An act relating to conveyances of land; creating s. 689.072, F.S.; providing for the transfer and creation of custodial property in an individual retirement account or certain qualified plans; incorporating statutory provisions into such transfer; providing powers to the custodian or trustee of such custodial property; providing protections for persons dealing with the custodian or trustee; exempting certain transfers from specific claims; providing for the disposition of custodial property held in an account, plan or custodianship that is terminated; providing a standard of care for the custodian or trustee; providing for certain declarations to control in specific legal proceedings; providing that provisions relating to deeds under statute of uses are not applicable to a transfer by a custodian or trustee under the act; providing for liberal construction; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 689.072, Florida Statutes, is created to read:

689.072 Real estate interests transferred to or by a custodian or trustee of an individual retirement account or qualified plan.--

(1)(a) A conveyance, deed, mortgage, lease assignment, or other recorded instrument that transfers an interest in real

property in this state, including a leasehold or mortgagee interest, to a person who is qualified to act as a custodian or trustee for an individual retirement account under 26 U.S.C. s. 408(a)(2), as amended, in which instrument the transferee is designated "custodian," "as custodian," "trustee," or "as trustee" and the account owner or beneficiary of the custodianship in the individual retirement account is named, creates custodial property and transfers title to the custodian or trustee when an interest in real property is recorded in the name of the custodian or trustee, followed by the words "as custodian or trustee for the benefit of (name of individual retirement account owner or beneficiary) individual retirement account."

(b) This section also applies to a qualified stock bonus, pension, or profit-sharing plan created under 26 U.S.C. s. 401(a), as amended, in which instrument a person is designated "custodian," "as custodian," "trustee," or "as trustee" and the plan, plan participant, or plan beneficiary of the custodianship in the plan also creates custodial property and transfers title to the custodian or trustee when an interest in real property is recorded in the name of the custodian or trustee, followed by the words "as custodian, or trustee of the (name of plan) for the benefit of (name of plan participant or beneficiary)."

(2) A transfer to a custodian or trustee of an individual retirement account or qualified plan pursuant to this section the incorporates the provisions of this section into the disposition and grants to the custodian or trustee the power to protect, conserve, sell, lease, encumber, or otherwise manage

and dispose of the real property described in the recorded instrument without joinder of the named individual retirement account owner, plan participant, or beneficiary, except as provided in subsection (5).

(3) A person dealing with the custodian or trustee does not have a duty to inquire as to the qualifications of the custodian or trustee and may rely on the powers of the custodian or trustee for the custodial property created under this section regardless of whether such powers are specified in the recorded instrument. A grantee, mortgagee, lessee, transferee, assignee, or person obtaining a satisfaction or release or otherwise dealing with the custodian or trustee regarding such custodial property is not required to inquire into:

(a) The identification or status of any named individual retirement account owner, plan participant, or beneficiary of the individual retirement account or qualified plan or his or her heirs or assigns to whom a custodian or trustee may be accountable under the terms of the individual retirement account agreement or qualified plan document;

(b) The authority of the custodian or trustee to act within and exercise the powers granted under the individual retirement account agreement or qualified plan document;

(c) The adequacy or disposition or any consideration provided to the custodian or trustee in connection with any interest acquired from such custodian or trustee; or

(d) Any provision of an individual retirement account agreement or qualified plan document.

(4) A person dealing with the custodian or trustee under

the recorded instrument takes any interest transferred by such custodian or trustee, within the authority provided under this section, free of claims of the named owner, plan participant, or beneficiary of the individual retirement account or qualified plan or of anyone claiming by, through, or under such owner, plan participant, or beneficiary.

(5) If notice of the revocation or termination of the individual retirement account agreement, qualified plan, or custodianship established under such individual retirement account agreement or qualified plan is recorded, any disposition or encumbrance of the custodial property must be by an instrument executed by the custodian or trustee or the successor and the respective owner, plan participant, or beneficiary of the individual retirement account or qualified plan.

(6) In dealing with custodial property created under this section, a custodian or trustee shall observe the standard of care of a prudent person dealing with property of another person. This section does not relieve the custodian or trustee from liability for breach of the individual retirement account agreement, custodial agreement, or qualified plan document.

(7) A provision of the recorded instrument that defines and declares the interest of the owner, plan participant, or beneficiary of the individual retirement account or qualified plan to be personal property controls only if a determination becomes an issue in any legal proceeding.

(8) As used in this section, the term "beneficiary" applies only when the individual retirement account owner or qualified plan participant is deceased.

(9)(a) This section does not apply to any deed, mortgage, or instrument to which s. 689.071 applies.

(b) Section 689.09 does not apply to transfers of real property interests to a custodian or trustee under this section.

(10) This section is remedial and shall be liberally construed to effectively carry out its purposes.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1163 Vacation and Timeshare Plans
SPONSOR(S): Mealor
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2630

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Insurance Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Current law requires sellers of timeshare property located outside the state of Florida to file a public offering statement with the Division of Florida Land Sales, Condominiums, and Mobile Homes for approval before they can provide any potential buyer in the state of Florida information regarding a timeshare unit. The developer must furnish the public offering statement to each potential purchaser as well.

This bill provides that a timeshare seller in Florida can offer timeshare interests in a timeshare plan located outside of Florida without filing a public offering statement as long as the seller meets certain disclosure criteria.

This bill also provides that a developer can provide a purchaser with the option of receiving documents, such as the public offering statement, through alternative media sources, and provides procedures that must be followed to ensure that the purchaser receives all necessary documents.

Timeshares may include condominium units and cooperatives and can be regulated in part by ch. 720, F.S. (Condominiums) and ch. 719, F.S. (Cooperatives). This bill provides that timeshare condominiums and cooperatives are not subject to the provisions pertaining to the transfer of association control condominium and cooperative law.

Currently, the timeshare seller and the managing entity must obtain insurance to protect the accommodations and facilities of the timeshare. This bill provides that any insurance can include reasonable deductibles as determined by the seller and then the managing entity.

This bill appears to have a positive recurring fiscal impact on state revenues of approximately $100,000, and an unknown but likely minimal negative recurring impact on expenditures, both affecting the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust fund. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill decreases government regulation of timeshare plans located outside the state of Florida. This bill also regulates the use of alternative media by developers.

B. EFFECT OF PROPOSED CHANGES:

Background

The Florida Vacation Plan and Timesharing Act establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.[1] A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods[2] or a condominium unit in which timeshare estates have been created.[3] A timeshare plan is any arrangement, plan, scheme, or similar device whereby a purchaser gives consideration for ownership rights in, or a right to use, any accommodations and facilities for less than a full year during any given year, but not necessarily for consecutive years. Prior to offering any timeshare plan, a developer must file a registered public offering statement with the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) of the Department of Business and Professional Regulation for approval.[4]

Requirements When Not Filing a Public Offering Statement

Under current law, a person cannot sell a timeshare or provide information to a prospective purchaser about a timeshare unit that is located outside the state of Florida, unless the timeshare plan has been filed and approved by the division. While a person is staying at a timeshare located inside the state of Florida the developer of the timeshare may want to provide the person with information about another timeshare for sale by that developer, including ones located out of the state.

This bill creates s. 721.03(11), F.S., which provides that a seller can offer timeshare interests in a timeshare plan located outside the state of Florida without filing a public offering statement, provided all of the following criteria have been satisfied:

- The Seller has provided a disclosure statement to each prospective purchaser. The disclosure statement must contain information that is substantially equivalent to the disclosures required in timeshare and multi-state timeshare public offering statements. The disclosure statement must also include exhibits of the following documents:
  - Declaration of condominium;
  - Cooperative documents;
  - Declaration of covenants and restrictions;
  - Articles of incorporation creating the owners' association;
  - Bylaws of the owners' association;
  - Management agreement and all maintenance and other contracts regarding the management and operation of the timeshare property which have terms in excess of 1 year;
  - Estimated operating budget for the timeshare plan and the required schedule of purchasers' expenses; and
  - Any other documents or instruments creating the timeshare plan.

[1] Sections 721.02(2), (3), F.S.
[2] Section 721.05(39), F.S.
[3] Section 718.103(26), F.S.
[4] Section 721.07, F.S.

- The seller must deliver the disclosure statement in a way that satisfies the requirements of ch. 721, F.S., regarding a public offering statement. The disclosure statement can be delivered by alternative media means as permitted in ch. 721, F.S.
- The seller must utilize and furnish to each purchaser a fully completed and executed copy of a purchase contract that contains the statement:

  > "You may cancel this contract without any penalty or obligation within 10 days after the date you sign this contract. If you decide to cancel this contract, you must notify the seller in writing of your intent to cancel. Your notice of cancellation shall be effective upon the date sent and shall be sent to the seller at (address) . Any attempt to obtain a waiver of your cancellation right is void and of no effect. While you may execute all closing documents in advance, the closing, as evidenced by delivery of the deed or other document, before expiration of your 10-day cancellation period, is prohibited."

  The contract must also contain the initial purchase price and any additional charges to which the purchaser could be subject to such as financing and the current year's annual assessment for common expenses.
- All purchase contracts must also contain the following statements in conspicuous type:
  - "This timeshare plan has not been reviewed or approved by the State of Florida"; and
  - "The timeshare interest you are purchasing requires certain procedures to be followed in order for you to use your interest. These procedures may be different from those followed in other timeshare plans. You should read and understand these procedures prior to purchasing".
- The seller can only offer an out-of-state plan on behalf of:
  - The developer of a timeshare plan that has been approved by the division within the last 7 years, or where an amendment by the developer has been approved by the division within the preceding 7 years, which timeshare plan has neither been terminated or withdrawn; or
  - A developer under common ownership or control with a developer described above provided that any common ownership must constitute as least a 50% ownership interest.
- An out-of state timeshare plan can only be offered to a person who already owns a timeshare interest in a timeshare plan filed by a developer that has met the 7-year requirements stated above.
- Any out-of-state timeshare plan must meet all requirements of ch. 720, F.S., except as provided in ss. 721.06, 721.065, 721.07, 721.27, 721.55, and 721.58, F.S. The out-of-state timeshare plan must also be eligible for any exemptions provided by ch. 721, F.S.
- Any escrow account required to be established by s. 721.08, F.S., can be maintained in the jurisdiction where the timeshare property is located.
- The seller must be required to provide notice of the out-of-state timeshare plan to the division on a form prescribed by the division, along with payment of a one-time fee not to exceed $1,000 per filing.

<u>One-to-One Purchaser to Accommodation Ratio</u>

Section 721.05(25), F.S., provides that the "one-to-one purchaser to accommodation ratio" is the ratio of the number of purchasers eligible to use the accommodations of a timeshare plan on a given day to the number of accommodations available for use within the plan on that day, such that the total number of purchasers eligible to use the accommodations of the timeshare plan during a given calendar year never exceeds the total number of accommodations available for use in the timeshare plan during that year. For purposes of calculation under this subsection, each purchaser must be counted at least once, and no individual timeshare unit may be counted more than 365 times per calendar year (or more than 366 times per leap year). A purchaser who is delinquent in the payment of timeshare plan assessments will continue to be considered eligible to use the accommodations of the timeshare plan for purposes

of this subsection notwithstanding any application of s. 721.13(6)[5].

This bill amends s. 721.05(25), F.S., by replacing all references to "calendar year" or "year" with "12-month period".

Public Offering Statement

A "public offering statement" is the written materials describing a single-site timeshare plan or a multi-site timeshare plan, including any exhibits attached thereto.[6] A developer must file a registered public offering statement with the division. The form of the purchaser public offering statement must provide fair, meaningful, and effective disclosure of all aspects of the timeshare plan.[7]

Section 721.07(6), F.S., provides that for timeshare plans filed pursuant to this part, the developer must furnish each purchaser with the following:

- A copy of the purchaser public offering statement text in the form approved by the division for delivery to purchasers;
- Copies of the exhibits required to be filed with the division pursuant to subparagraphs (5)(ff)1., 2., 4., 5., 8., and 20;
- A receipt for timeshare plan documents and a list describing any exhibit to the filed public offering statement filed with the division which is not delivered to the purchaser. The division is authorized to prescribe by rule the form of the receipt for timeshare plan documents and the description of exhibits list that must be furnished to the purchaser. The description of documents list utilized by a developer shall be filed with the division for review as part of the filed public offering statement pursuant to this section. The developer shall be required to provide the managing entity with a copy of the approved filed public offering statement and any approved amendments thereto to be maintained by the managing entity as part of the books and records of the timeshare plan pursuant to s. 721.13(3)(d);
- Any other exhibit which the developer includes as part of the purchaser public offering statement, provided that the developer first files the exhibit with the division;
- An executed copy of any document which the purchaser signs; and
- A fully executed paper copy of the purchase contract.

This bill amends s. 721.07(6), F.S., by deleting the requirement that developers must furnish to each purchaser a fully executed paper copy of the purchase contract.

Use of Alternative Media to Deliver Documents

This bill creates 721.07(7), F.S., which provides that a developer can provide a purchaser with the option of receiving any document required by ch. 721, F.S. through alternative media instead of delivering a paper copy to the purchaser. The purchaser's choice of document format must be made in writing on a separate form that must disclose the system requirements necessary to view the alternative media and must be signed by the purchaser. The form must also state that the purchaser should not select alternative media unless it can be viewed by the purchaser before the expiration of the 10-day cancellation period.

If only a portion of the documents are delivered by alternative media, then the developer must identify which information appears in the alternative media and which information is being delivered in paper format in the table of contents and in the receipt for timeshare documents.

---

[5] Section 721.13(6), F.S., provides that "The managing entity of any timeshare plan located in this state may deny the use of the accommodations and facilities of the timeshare plan to any purchaser who is delinquent in the payment of any assessments made by the managing entity against such purchaser for common expenses or for ad valorem real estate taxes".

[6] Section 721.05(29), F.S.

[7] Section 721.07(6), F.S.

If a purchase contract is delivered by alternative media, the alternative media must contain substantially the following statement located on the outside of any compact disc or other alternative media jacket, sleeve, or other container:

> "You may cancel your contract without any penalty or obligation within 10 calendar days after you sign the contract or the date you receive the last of all documents required to be delivered to you. Refer to your purchase contract for more details."

This bill gives the division the authority to determine by rule where the statement must be located.

This bill also provides that the order and content of a public offering statement delivered through alternative media must comply with the rules of the division. Prior to delivery of the public offering statement through alternative media, the developer must give the division a copy of the public offering statement in the alternative media format proposed to be used by the developer together with the executed certificate, using forms provided by the division, certifying that the portion of the public offering statement delivered through the proposed alternative media format is accurate and, where practicable, identical to the written public offering statement. The alternative media format used to view the public offering statement can contain additional materials such as advertising materials. Where other materials are contained in the alternative media, the location of the public offering statement must be specifically and prominently identified in the alternative media and easily accessed by the purchaser. If the developer subsequently amends the written public offering statement, the alternative media public offering statement must also be amended to conform to the amendment, and the developer must file with the division an executed certificate certifying that public offering statement in the alternative media format are identical to the written public offering statement. The developer can provide paper copies of the amendments to the purchaser.

Management of Timeshare Plans

Section 721.13, F.S., provides that for each timeshare plan, the developer must provide for a managing entity, which must be the developer, a separate manager or management firm, or an owners' association. Where there is a condominium or cooperative timeshare that requires a mandatory owners' association, the board of administration must be considered the managing entity of the timeshare plan.

This bill amends s. 721.13, F.S., to provide that notwithstanding anything to the contrary contained in condominium or cooperative law, timeshare condominium associations and cooperative associations are not subject to the provisions of s. 718.301, F.S. or s. 719.301, F.S., pertaining to the transfer of condominium and cooperative association control.

Insurance for Timeshare Accommodations and Facilities

Section 721.165, F.S., provides that the seller, and thereafter, the managing entity, is responsible for obtaining insurance to protect the accommodations and facilities of the timeshare plan in an amount equal to the replacement cost of such accommodations and facilities.

This bill amends s. 721.165, F.S., to provide that any insurance may include reasonable deductibles as determined initially by the seller and thereafter by the managing entity.

C. SECTION DIRECTORY:

Section 1 amends s. 721.03, F.S., to provide criteria that must be met before a seller can offer a timeshare interest in a timeshare plan located outside the state of Florida without filing a public offering statement.

Section 2 amends s. 721.05, F.S., to replace all references to "calendar year" or "year" with "12-month period".

Section 3 amends s. 721.07, F.S., to remove language requiring the developer to furnish each purchaser a fully executed paper copy of the purchase contract. This section also provides requirements for using alternative media options for the delivery of documents required by ch. 721, F.S.

Section 4 amends s. 721.13, F.S., to provide that timeshare condominiums and cooperatives are not subject to the condominium or cooperative provisions pertaining to transition of association control.

Section 5 amends s. 721.165, F.S. to provide that any insurance may include reasonable deductibles as determined initially by the seller and thereafter by the managing entity.

Section 6 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT [8]

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill will have a negative fiscal impact on state government revenues. Amending s. 721.03, F.S., will exempt developers from registering certain out of state timeshare plans. The change to section 721.03, F.S., will remove the language directing the department from collecting the registration fees ($2/timeshare week) for those exempted timeshare plans. This will be partially off-set by the one-time fee of $1,000 payable to the division for the developer exercising this exemption from filing. There are currently 78 out of state timeshare projects (comprising 161,888 timeshare weeks) filed with the division. During FY 2004/05, 11 projects (comprising 51,056 timeshare weeks) were filed. The division is unable to determine the number of projects that would be entitled to this exemption; however, based upon FY 2004/05 filings and if all 11 projects were to have been entitled to this exemption, the division would receive $11,000 in exemption fees instead of $102,112 in filing fees and $102,112 in annual fees.

2. Expenditures:

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Recurring Effects	FY 2006-07	FY 2007-08	FY 2008-09
Salaries/Benefits # of FTE's	0	0	0
Expenses	0	0	0
Other (identify)	0	0	0
Subtotal	0	0	0

Non-Operating Expenditures	FY 2006-07	FY 2007-08	FY 2008-09
Service Charges (to General Revenue)	(6,651)	(6,651)	(6,651)
Other Indirect Costs	0	0	0
Subtotal	(6,651)	(6,651)	(6,651)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

[8] Fiscal impact provided by DBPR on March 13, 2006

This bill will require sellers of out-of-state timeshare plans to file notice of their plan to the Division of Florida Land Sales, Condominiums, and Mobile Homes along with payment of a $1,000 filing fee.

DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR	
Direct Private Sector Costs	Each seller who is entitled to the exemption and elects not to file a public offering statement with the department would pay a $1,000 exemption fee.
Direct Private Sector Benefits	Each seller who is entitled to the exemption and elects not to file a public offering statement with the department would not have to pay the $2/timeshare week fee.
Effects on Competition, Private Enterprise & Employment Markets	Unknown

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Section 721 03(11)(g), F.S., requires a form to be prescribed by the division. This bill authorizes the Division of Florida Land Sales, Condominiums, and Mobile Homes to prescribe by rule the prominent location where the statement, regarding the canceling of the contract, must be located on any compact disc or other alternative media jacket, sleeve, or other container.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

A bill to be entitled

An act relating to vacation and timeshare plans; amending s. 721.03, F.S.; authorizing a seller to offer timeshare interests in timeshare plans located outside of this state without filing a public offering statement for such out-of-state timeshare plan; providing criteria for such offers; amending s. 721.05, F.S.; revising the definition of the term "one-to-one purchaser to accommodation ratio"; amending s. 721.07, F.S.; providing that the developer may deliver certain documents by means of certain alternative media; prescribing guidelines for the use of alternative media in the delivery of such documents; requiring certain alternative media to contain a disclosure statement; amending s. 721.13, F.S.; providing that timeshare condominium associations and timeshare cooperative associations are not subject to certain provisions relating to transfer of association control; amending s. 721.165, F.S.; authorizing certain insurance to include reasonable deductibles as determined initially by the seller and thereafter by the managing entity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (11) is added to section 721.03, Florida Statutes, to read:

721.03 Scope of chapter.--

(11) A seller may offer timeshare interests in a timeshare plan located outside of this state without filing a public offering statement for such out-of-state timeshare plans pursuant to s. 721.07 or s. 721.55, provided all of the following criteria have been satisfied:

(a) The seller shall provide a disclosure statement to each prospective purchaser of such out-of-state timeshare plan. The disclosure statement shall contain information that is substantively equivalent to the disclosures required to be provided for similar timeshare plans pursuant to s. 721.07 or s. 721.55, whichever is applicable. The disclosure statement shall also include the exhibits that are required by s. 721.07(5)(ff)1., 2., 3., 4., 5., 7., 8., and 20.

(b) With respect to any offer for an out-of-state timeshare plan made pursuant to this subsection, the delivery by the seller to a prospective purchaser of the disclosure statement required by paragraph (a) shall be deemed to satisfy any requirement of this chapter regarding a public offering statement. The disclosure statement and any other required documents may be delivered by means of alternative media as otherwise permitted by this chapter.

(c) The seller shall utilize and furnish to each purchaser of an out-of-state timeshare plan offered pursuant to this subsection a fully completed and executed copy of a purchase contract that contains the statement set forth in s. 721.065(2)(c) in conspicuous type located immediately prior to the space in the contract reserved for the purchaser's signature. The contract shall also contain the initial purchase

price and any additional charges to which the purchaser may be subject in connection with the purchase of the timeshare plan, such as financing, or that will be collected from the purchaser on or before closing, such as the current year's annual assessment for common expenses.

(d) All purchase contracts for out-of-state timeshare plans offered pursuant to this subsection must also contain the following statements in conspicuous type:

This timeshare plan has not been reviewed or approved by the State of Florida.

The timeshare interest you are purchasing requires certain procedures to be followed in order for you to use your interest. These procedures may be different from those followed in other timeshare plans. You should read and understand these procedures prior to purchasing.

(e)1. An out-of-state timeshare plan may only be offered pursuant to this subsection by the seller on behalf of:

a. The developer of a timeshare plan that has been approved by the division within the preceding 7 years pursuant to s. 721.07 or s. 721.55, or concerning which an amendment by the developer has been approved by the division within the preceding 7 years, which timeshare plan has neither been terminated nor withdrawn; or

b. A developer under common ownership or control with a developer described in sub-subparagraph a., provided that any

common ownership shall constitute at least a 50-percent ownership interest.

2. An out-of-state timeshare plan may only be offered pursuant to this subsection to a person who already owns a timeshare interest in a timeshare plan filed by a developer described in subparagraph 1.

(f)1. Except as provided in ss. 721.06, 721.065, 721.07, 721.27, 721.55, and 721.58, any out-of-state timeshare plan offered pursuant to this subsection must meet all requirements of this chapter. The out-of-state timeshare plan shall also be eligible for any exemptions provided by this chapter.

2. Any escrow account required to be established by s. 721.08 for any out-of-state timeshare plan offered under this subsection may be maintained in the situs jurisdiction.

(g) Any seller of an out-of-state timeshare plan offered pursuant to this subsection shall be required to provide notice of such plan to the division on a form prescribed by the division, along with payment of a one-time fee not to exceed $1,000 per filing.

Section 2. Subsection (25) of section 721.05, Florida Statutes, is amended to read:

721.05 Definitions.--As used in this chapter, the term:

(25) "One-to-one purchaser to accommodation ratio" means the ratio of the number of purchasers eligible to use the accommodations of a timeshare plan on a given day to the number of accommodations available for use within the plan on that day, such that the total number of purchasers eligible to use the accommodations of the timeshare plan during any 12-month period

~~a given calendar year~~ never exceeds the total number of accommodations available for use in the timeshare plan during that 12-month period ~~year~~. For purposes of calculation under this subsection, each purchaser must be counted at least once, and no individual timeshare unit may be counted more than 365 times per 12-month period ~~calendar year~~ (or more than 366 times per leap year). A purchaser who is delinquent in the payment of timeshare plan assessments shall continue to be considered eligible to use the accommodations of the timeshare plan for purposes of this subsection notwithstanding any application of s. 721.13(6).

Section 3. Paragraph (f) of subsection (6) of section 721.07, Florida Statutes, is amended, and subsection (7) is added to that section, to read:

721.07 Public offering statement.--Prior to offering any timeshare plan, the developer must submit a filed public offering statement to the division for approval as prescribed by s. 721.03, s. 721.55, or this section. Until the division approves such filing, any contract regarding the sale of that timeshare plan is subject to cancellation by the purchaser pursuant to s. 721.10.

(6) The division is authorized to prescribe by rule the form of the approved purchaser public offering statement that must be furnished by the developer to each purchaser. The form of the purchaser public offering statement must provide fair, meaningful, and effective disclosure of all aspects of the timeshare plan. For timeshare plans filed pursuant to this part, the developer shall furnish each purchaser with the following:

~~(f) Each purchaser shall receive a fully executed paper copy of the purchase contract.~~

(7)(a) A developer may provide a purchaser with the option of receiving through alternative media, in any commercially acceptable format, any document required by this chapter to be delivered to a purchaser in lieu of delivering a paper copy of such document to the purchaser. The purchaser's choice of the document format shall be set forth in writing on a separate form that shall also disclose the system requirements necessary to view the alternative media and shall be signed by the purchaser. The form shall also state that the purchaser should not select alternative media unless the alternative media can be viewed by the purchaser prior to expiration of the 10-day cancellation period. The alternative media disclosure statement shall be listed on the receipt for timeshare documents pursuant to a form prescribed by the division.

(b) If a portion, but not all, of such documents is delivered to a purchaser through the use of alternative media, the developer shall identify which information appears in the alternative media and which information is being delivered in paper format in the applicable table of contents and in the receipt for timeshare documents.

(c) If a purchase contract is delivered by alternative media pursuant to this subsection, such alternative media shall contain substantially the following statement located on the outside of any compact disc or other alternative media jacket, sleeve, or other container:

You may cancel your contract without any penalty or obligation within 10 calendar days after you sign the contract or the date you receive the last of all documents required to be delivered to you. Refer to your purchase contract for more details.

The division is authorized to prescribe by rule the prominent location where the statement shall be located.

(d) The order and content of a purchaser public offering statement or a multisite purchaser public offering statement delivered through alternative media shall comply with rules adopted or issued by the division.

(e) Prior to delivery of the purchaser public offering statement through alternative media, the developer must submit to the division a copy of the purchaser public offering statement in the alternative media format proposed to be used by the developer together with an executed certificate, using forms prescribed by the division, certifying that the portion of the purchaser public offering statement delivered through the proposed alternative media format is an accurate representation of, and, where practical, identical to, the corresponding portion of the written purchaser public offering statement.

(f) The alternative media format used to display the purchaser public offering statement may also contain materials in addition to the purchaser public offering statement, including advertising materials. In the event that the alternative media contains materials other than the purchaser public offering statement, the location of the purchaser public offering statement in the alternative media must be specifically

and prominently identified in the alternative media and easily accessed by the purchaser.

(g) If the developer subsequently amends the written purchaser public offering statement, the alternative media purchaser public offering statement must also be amended to conform to such amendment, and the developer shall file with the division an executed certificate, using forms prescribed by the division, certifying that the portions of the purchaser public offering statement set forth in alternative media format are identical to the corresponding portions of the written purchaser public offering statement, as amended. Alternatively, the developer may provide paper copies of the amendments to the purchaser.

Section 4. Paragraph (b) of subsection (1) of section 721.13, Florida Statutes, is amended to read:

721.13 Management.--

(1)

(b)1. With respect to a timeshare plan which is also regulated under chapter 718 or chapter 719, or which contains a mandatory owners' association, the board of administration of the owners' association shall be considered the managing entity of the timeshare plan.

2. During any period of time in which such owners' association has entered into a contract with a manager or management firm to provide some or all of the management services to the timeshare plan, both the board of administration and the manager or management firm shall be considered the managing entity of the timeshare plan and shall be jointly and

severally responsible for the faithful discharge of the duties of the managing entity.

3. An owners' association which is the managing entity of a timeshare plan that includes condominium units or cooperative units shall not be considered a condominium association pursuant to the provisions of chapter 718 or a cooperative association pursuant to the provisions of chapter 719, unless such owners' association also operates the entire condominium pursuant to s. 718.111 or the entire cooperative pursuant to s. 719.104.

4. Notwithstanding anything to the contrary contained in chapter 718 or chapter 719, timeshare condominium associations and timeshare cooperative associations are not subject to the provisions of s. 718.301 or s. 719.301.

Section 5. Subsection (1) of section 721.165, Florida Statutes, is amended to read:

721.165 Insurance.--

(1) The seller, initially, and thereafter the managing entity, shall be responsible for obtaining insurance to protect the accommodations and facilities of the timeshare plan in an amount equal to the replacement cost of such accommodations and facilities. Any insurance, regardless of any requirement in the timeshare instrument for coverage for "full insurable value," "replacement cost," or the like, may include reasonable deductibles as determined initially by the seller and thereafter by the managing entity. Failure to obtain and maintain the insurance required by this subsection during any period of developer control of the managing entity shall constitute a breach of s. 721.13(2)(a) by the managing entity, unless the

managing entity can show that, despite such failure, it exercised due diligence to obtain and maintain the insurance required by this subsection.

Section 6. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 1163**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Mealor offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Paragraph (e) of subsection (3) is amended, and subsection (11) is added, to section 721.03, Florida Statutes, to read:

721.03 Scope of chapter.--

(3) A timeshare plan which is subject to the provisions of chapter 718 or chapter 719, if fully in compliance with the provisions of this chapter, is exempt from the following:

(e) Part VI of chapter 718 and part VI of chapter 719, relating to conversion of existing improvements to the condominium or cooperative form of ownership, respectively, provided that a developer converting existing improvements to a timeshare condominium or timeshare cooperative must comply with ss. 718.606, 718.608, 718.61, and 718.62, or ss. 719.606, 719.608, 719.61, and 719.62, if applicable, and, if the existing improvements received a certificate of occupancy more than 18 months before such conversion, one of the following:

1. The accommodations and facilities shall be renovated and improved to a condition such that the remaining useful life in years of the roof, plumbing, air-conditioning, and any component of the structure which has a useful life less than the useful life of the overall structure is equal to the useful life of accommodations or facilities that would exist if such accommodations and facilities were newly constructed and not previously occupied.

2. The developer shall fund reserve accounts for capital expenditures and deferred maintenance for the roof, plumbing, air-conditioning, and any component of the structure the useful life of which is less than the useful life of the overall structure. The reserve accounts shall be funded for each component in an amount equal to the product of the estimated current replacement cost of such component as of the date of such conversion (as disclosed and substantiated by a certificate under the seal of an architect or engineer authorized to practice in this state) multiplied by a fraction, the numerator of which shall be the age ~~remaining life~~ of the component in years (as disclosed and substantiated by a certificate under the seal of an architect or engineer authorized to practice in this state) and the denominator of which shall be the total useful life of the component in years (as disclosed and substantiated by a certificate under the seal of an architect or engineer authorized to practice in this state). Alternatively, the reserve accounts may be funded for each component in an amount equal to the amount that, except for the application of this subsection, would be required to be maintained pursuant to s. 718.618(1) or s. 719.618(1). The developer shall fund the reserve accounts contemplated in this subparagraph out of the proceeds of each sale of a timeshare interest, on a pro rata

basis, in an amount not less than a percentage of the total amount to be deposited in the reserve account equal to the percentage of ownership allocable to the timeshare interest sold. When an owners' association makes an expenditure of reserve account funds before the developer has initially sold all timeshare interests, the developer shall make a deposit in the reserve account if the reserve account is insufficient to pay the expenditure. Such deposit shall be at least equal to that portion of the expenditure which would be charged against the reserve account deposit that would have been made for any such timeshare interest had the timeshare interest been initially sold. When a developer deposits amounts in excess of the minimum reserve account funding, later deposits may be reduced to the extent of the excess funding.

3. The developer shall provide each purchaser with a warranty of fitness and merchantability pursuant to s. 718.618(6) or s. 719.618(6).

(11) A seller may offer timeshare interests in a real property timeshare plan located outside of this state without filing a public offering statement for such out-of-state real property timeshare plans pursuant to s. 721.07 or s. 721.55, provided all of the following criteria have been satisfied:

(a) The seller shall provide a disclosure statement to each prospective purchaser of such out-of-state timeshare plan. The disclosure statement shall contain information that is substantively equivalent to the disclosures required to be provided for similar timeshare plans pursuant to s. 721.07 or s. 721.55, whichever is applicable. The disclosure statement shall also include the exhibits that are required by s. 721.07(5)(ff)1., 2., 3., 4., 5., 7., 8., and 20.

(b) With respect to any offer for an out-of-state timeshare plan made pursuant to this subsection, the delivery by the seller to a prospective purchaser of the disclosure statement required by paragraph (a) shall be deemed to satisfy any requirement of this chapter regarding a public offering statement.

(c) The seller shall utilize and furnish to each purchaser of an out-of-state timeshare plan offered pursuant to this subsection a fully completed and executed copy of a purchase contract that contains the statement set forth in s. 721.065(2)(c) in conspicuous type located immediately prior to the space in the contract reserved for the purchaser's signature. The contract shall also contain the initial purchase price and any additional charges to which the purchaser may be subject in connection with the purchase of the timeshare plan, such as financing, or that will be collected from the purchaser on or before closing, such as the current year's annual assessment for common expenses.

(d) All purchase contracts for out-of-state timeshare plans offered pursuant to this subsection must also contain the following statements in conspicuous type:

This timeshare plan has not been reviewed or approved by the State of Florida.

The timeshare interest you are purchasing requires certain procedures to be followed in order for you to use your interest. These procedures may be different from those followed in other timeshare plans. You should read and understand these procedures prior to purchasing.

(e)1. An out-of-state timeshare plan may only be offered pursuant to this subsection by the seller on behalf of:

a. The developer of a timeshare plan that has been approved by the division within the preceding 7 years pursuant to s. 721.07 or s. 721.55, or concerning which an amendment by the developer has been approved by the division within the preceding 7 years, which timeshare plan has neither been terminated nor withdrawn; or

b. A developer under common ownership or control with a developer described in sub-subparagraph a., provided that any common ownership shall constitute at least a 50-percent ownership interest.

2. An out-of-state timeshare plan may only be offered pursuant to this subsection to a person who already owns a timeshare interest in a timeshare plan filed by a developer described in subparagraph 1.

(f)1. Except for ss. 721.06, 721.065, 721.07, 721.27, 721.55, and 721.58, any out-of-state timeshare plan offered pursuant to this subsection must meet all requirements of this chapter. The out-of-state timeshare plan shall also be eligible for any exemptions provided by this chapter.

2. Any escrow account required to be established by s. 721.08 for any out-of-state timeshare plan offered under this subsection may be maintained in the situs jurisdiction.

(g) Any seller of an out-of-state timeshare plan offered pursuant to this subsection shall be required to provide notice of such plan to the division on a form prescribed by the division, along with payment of a one-time fee not to exceed $1,000 per filing.

Section 2. Subsection (25) of section 721.05, Florida Statutes, is amended to read:

721.05 Definitions.--As used in this chapter, the term:

(25) "One-to-one purchaser to accommodation ratio" means the ratio of the number of purchasers eligible to use the accommodations of a timeshare plan on a given day to the number of accommodations available for use within the plan on that day, such that the total number of purchasers eligible to use the accommodations of the timeshare plan during any 12-month period ~~a given calendar year~~ never exceeds the total number of accommodations available for use in the timeshare plan during that 12-month period ~~year~~. For purposes of calculation under this subsection, each purchaser must be counted at least once, and no individual timeshare unit may be counted more than 365 times per 12-month period ~~calendar year~~ (or more than 366 times per leap year). A purchaser who is delinquent in the payment of timeshare plan assessments shall continue to be considered eligible to use the accommodations of the timeshare plan for purposes of this subsection notwithstanding any application of s. 721.13(6).

Section 3. Paragraph (b) of subsection (1), and paragraph (c) of subsection (3), of section 721.13, Florida Statutes, are amended to read:

721.13 Management.--

(1)

(b)1. With respect to a timeshare plan which is also regulated under chapter 718 or chapter 719, or which contains a mandatory owners' association, the board of administration of the owners' association shall be considered the managing entity of the timeshare plan.

2. During any period of time in which such owners' association has entered into a contract with a manager or management firm to provide some or all of the management

services to the timeshare plan, both the board of administration and the manager or management firm shall be considered the managing entity of the timeshare plan and shall be jointly and severally responsible for the faithful discharge of the duties of the managing entity.

3. An owners' association which is the managing entity of a timeshare plan that includes condominium units or cooperative units shall not be considered a condominium association pursuant to the provisions of chapter 718 or a cooperative association pursuant to the provisions of chapter 719, unless such owners' association also operates the entire condominium pursuant to s. 718.111 or the entire cooperative pursuant to s. 719.104.

4.a. Notwithstanding anything to the contrary contained in chapter 718 or chapter 719, timeshare condominium associations and timeshare cooperative associations created after July 1, 2006 are not subject to the provisions of ss. 718.301(1)-(2) or ss. 719.301(1)-(2), unless a majority of those present at a duly called meeting of the association other than any developer, which majority shall constitute at least 15 percent of the total voting interests other than those owned by any developer, vote to hold a transfer of control election. A meeting to decide whether to have a transfer of control election shall be conducted upon the written request of 15 percent of the total voting interests other than those owned by any developer. If a transfer of control election is approved, that election when held shall entitle purchasers other than a developer to elect a majority of the members of the board of administration of the association.

b. No transfer of control election held pursuant to this subparagraph shall be held prior to the time that transfer of majority control of the members of the board of administration

of the association would otherwise be required by the provisions of s. 718.301(1) or s. 719.301(1). After that time has been reached, the election approved as provided in sub-subparagraph a., shall be held with 75 days after the vote authorizing a transfer of control election. After purchasers other than a developer vote to elect a majority of the members of the board of administration of the association, a developer may exercise the right to vote any developer-owned timeshare interests in the same manner as any purchaser except for purposes of reacquiring control of the association or selecting a majority of the members of the board of administration.

(3) The duties of the managing entity include, but are not limited to:

(c)3. With respect to any timeshare plan that has a managing entity that is an owners' association, reserves may be waived or reduced by a majority vote of those voting interests that are present, in person or by proxy, at a duly called meeting of the owner's association. If a meeting of the purchasers has been called to determine whether to waive or reduce the funding of reserves, and no such result is achieved or a quorum is not attained, the reserves as included in the budget shall go into effect.

Section 4. Subsection (1) of section 721.165, Florida Statutes, is amended to read:

721.165 Insurance.--

(1) The seller, initially, and thereafter the managing entity, shall be responsible for obtaining insurance to protect the accommodations and facilities of the timeshare plan in an amount equal to the replacement cost of such accommodations and facilities. Any insurance, regardless of any requirement in the timeshare instrument for coverage for "full insurable value,"

"replacement cost," or the like, may include reasonable deductibles as determined initially by the seller and thereafter by the managing entity. Failure to obtain and maintain the insurance required by this subsection during any period of developer control of the managing entity shall constitute a breach of s. 721.13(2)(a) by the managing entity, unless the managing entity can show that, despite such failure, it exercised due diligence to obtain and maintain the insurance required by this subsection.

Section 5. This act shall take effect July 1, 2006.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to vacation and timeshare plans; amending s. 721.03, F.S.; revising the formula for funding reserve accounts; authorizing a seller to offer timeshare interests in timeshare plans located outside of this state without filing a public offering statement for such out-of-state timeshare plan; providing criteria for such offers; amending s. 721.05, F.S.; revising the definition of the term "one-to-one purchaser to accommodation ratio"; amending s. 721.13, F.S.; providing that timeshare condominium associations and timeshare cooperative associations are not subject to certain provisions relating to transfer of association control; authorizing reserves to be waived or reduced; amending s. 721.165, F.S.; authorizing certain insurance to include reasonable deductibles as determined initially by the seller and thereafter by the managing entity; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJ 06-02 Adoption Records
SPONSOR(S): Civil Justice Committee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Civil Justice Committee		Shaddock	Bond
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The PCB provides a mechanism for the Department of Health to receive a notification of the filing of a petition for termination of parental rights. Moreover, the PCB authorizes the Department of Health to release an original sealed birth certificate on court order only to the Department of Children and Family Services.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This PCB does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Current Law

Florida has established a Putative Father Registry ("Registry") to attempt to preserve the rights of unmarried biological fathers in adoption cases. The Registry is established and operated through the Office of Vital Statistics of the Department of Health. If a man is concerned that he may be the father of a child born or about to be born to a woman, and that man wishes to establish parental rights, he must file as a "registrant" with the Registry.[1]

By filing with the Registry, the potential father is claiming paternity for the child and confirms his willingness to support the child. Additionally, he consents to DNA testing, and may ultimately be required to pay child support. A claim of paternity may be filed at any time prior to the child's birth, but a claim of paternity may not be filed after the date a petition is filed for termination of parental rights.[2]

The possible father may change his mind and prior to the birth of the child execute a notarized revocation of the claim of paternity.[3] Once that revocation is received, the claim of paternity is deemed null and void. Plus, if a court determines that a registrant is not the father of a minor, the court will order the man's name removed from the registry.[4]

All hearings and records in adoption proceedings are confidential.[5] Court hearings are held in closed court, and all papers and records pertaining to the adoption, whether part of the permanent record of the court or a file in the office of an adoption entity, are confidential and subject to inspection only upon court order.

Generally, identifying information regarding the birth parents, adoptive parents, and adoptee may not be disclosed unless that person has authorized in writing the release of that information. Yet, a court may, upon petition of an adult adoptee, for good cause shown, appoint an intermediary or a licensed child-placing agency to contact a birth parent who has not registered with the adoption registry and advise them of the availability of the registry.

Effect of Bill

When a possible father executes a revocation of previously filed a claim of paternity with the Registry, the adoption entity must provide the Department of Health ("Department") with a notification of that filing. The Department is authorized to adopt by rule a form to be completed by the clerk of court for notification of such a filing.

The PCB directs that if a court determines that a registrant is not the father of a child or has no parental rights; the court must order the Department to remove the registrant's name from the registry.

---

[1] Section 63.054 (1), F.S.
[2] *Id.*
[3] Section 63.054 (5), F.S.
[4] *Id.*
[5] Section 63.162, F.S.

Finally, the PCB provides that based upon proceedings to unseal an original birth certificate, the Department may release an original sealed birth certificate only to the Department of Children and Family Services unless otherwise ordered by the court. That birth certificate will only be released by written request from the Department of Children and Family Services and in such a way to ensure its confidentiality.

C. SECTION DIRECTORY:

Section 1 amends s. 63.054, F.S. to require notification of a filing of a petition for termination of parental rights

Section 2 amends s. 63.162, F.S to limit release of an original birth certificate.

Section 3 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The PCB authorizes the Department of Health to adopt by rule a form to be completed by the clerk of court for notification of filing a petition for termination of parental rights.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

A bill to be entitled

An act relating to adoption; amending s. 63.054, F.S.; requiring notice in adoption cases; requiring rulemaking; requiring removal from the paternity registry; amending s. 63.162, F.S.; limiting release of adoption records; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1), subsection (5) of section 63.054, Florida Statutes, are amended to read:

63.054 Actions required by an unmarried biological father to establish parental rights; Florida Putative Father Registry.--

(1) In order to preserve the right to notice and consent to an adoption under this chapter, an unmarried biological father must, as the "registrant," file a notarized claim of paternity form with the Florida Putative Father Registry maintained by the Office of Vital Statistics of the Department of Health and shall include therein confirmation of his willingness and intent to support the child for whom paternity is claimed in accordance with state law. The claim of paternity may be filed at any time prior to the child's birth, but a claim of paternity may not be filed after the date a petition is filed for termination of parental rights. The adoption entity shall provide the Department of Health with a notification of filing of the petition for termination of parental rights. The Department of Health shall adopt by rule a form to be completed by the clerk of court for notification of filing a petition for termination of parental rights.

(5) The registrant may, at any time prior to the birth of the child for whom paternity is claimed, execute a notarized written revocation of the claim of paternity previously filed with the Florida Putative Father Registry, and upon receipt of such revocation, the claim of paternity shall be deemed null and void. If a court determines that a registrant is not the father of the minor, or has no parental rights, the court shall order the Department of Health ~~the department~~ to remove the registrant's name from the registry.

Section 2. Subsection (8) is added to section 63.162, Florida Statutes, to read:

63.162 Hearings and records in adoption proceedings; confidential nature.--

(8) As a result of any proceeding under s. 382.015, this section, or any other proceeding to unseal an original birth certificate, the Department of Health may release an original sealed birth certificate only to the department unless otherwise ordered by the court. The birth certificate shall be released only upon written request from the department and in such a manner as to ensure confidentiality.

Section 3. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **PCB CJ 06-02**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Mahon offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsections (1) and (5) of section 63.054, Florida Statutes, are amended to read:

63.054 Actions required by an unmarried biological father to establish parental rights; Florida Putative Father Registry.--

(1) In order to preserve the right to notice and consent to an adoption under this chapter, an unmarried biological father must, as the "registrant," file a notarized claim of paternity form with the Florida Putative Father Registry maintained by the Office of Vital Statistics of the Department of Health and shall include therein confirmation of his willingness and intent to support the child for whom paternity is claimed in accordance with state law. The claim of paternity may be filed at any time prior to the child's birth, but a claim of paternity may not be filed after the date a petition is filed for termination of parental rights. In each proceeding for termination of parental rights, the petitioner shall submit to

the Office of Vital Statistics of the Department of Health a copy of the petition for termination of parental rights. The Office of Vital Statistics of the Department of Health shall not record a claim of paternity after the date that a petition for termination of parental rights is filed.

(5) The registrant may, at any time prior to the birth of the child for whom paternity is claimed, execute a notarized written revocation of the claim of paternity previously filed with the Florida Putative Father Registry, and upon receipt of such revocation, the claim of paternity shall be deemed null and void. If a court determines that a registrant is not the father of the minor, or has no parental rights, the court shall order the Department of Health ~~the department~~ to remove the registrant's name from the registry.

Section 2. Subsection (4) of section 63.062, Florida Statutes, is amended to read:

63.062 Persons required to consent to adoption; affidavit of nonpaternity; waiver of venue.--

(4) Any person whose consent is required under paragraph (1)(b), or any other man, ~~paragraphs (1)(c)-(e)~~ may execute an irrevocable affidavit of nonpaternity in lieu of a consent under this section and by doing so waives notice to all court proceedings after the date of execution. An affidavit of nonpaternity must be executed as provided in s. 63.082. The affidavit of nonpaternity may be executed prior to the birth of the child. The person executing the affidavit must receive disclosure under s. 63.085 prior to signing the affidavit.

Section 3. Section 63.182, Florida Statutes, is amended to read:

63.182 Statute of repose.--

(1) Notwithstanding s. 95.031 or s. 95.11 or any other statute, an action or proceeding of any kind to vacate, set aside, or otherwise nullify a judgment of adoption or an underlying judgment terminating parental rights on any ground may not be filed more than 1 year after entry of the judgment terminating parental rights.

(2)(a) Except for the specific persons expressly entitled to be given notice of an adoption in accordance with this chapter, the interest which entitles a person to notice of an adoption must be direct, financial, and immediate and the person must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of an indirect, inconsequential, or contingent interest is wholly inadequate and a person with this indirect interest lacks standing to set aside a judgment of adoption.

(b) This subsection is remedial and shall apply to all adoptions, including those in which a judgment of adoption has already been entered.

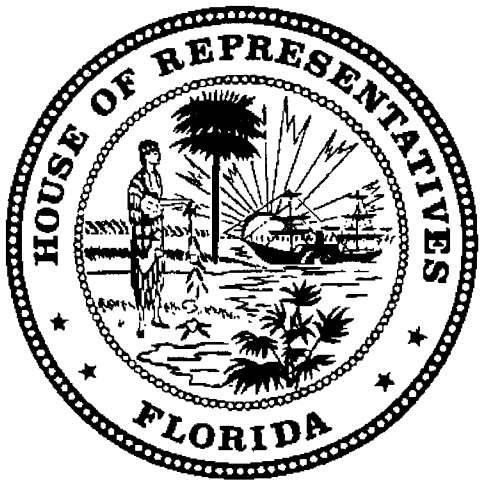
Section 4. This act shall take effect upon becoming law.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to adoption; amending s. 63.054, F.S.; requiring a petitioner in a case for termination of parental rights proceeding to provide notice to the Department of Health; requiring the Department of Health to not record a claim of paternity after the date that a termination of parental rights is recorded; requiring the Department of Health to remove a registrant's name from the Florida Putative Father Registry upon a finding that the registrant has not parental rights; amending s.

63.062, F.S.; modifying consent required for adoption; amending s. 63.182, F.S.; providing that the interest that entitles a person to notice of an adoption proceeding must be direct, financial, and immediate; providing an exception; providing that a showing of an indirect, inconsequential, or contingent interest is wholly inadequate; providing construction and applicability; providing an effective date.



Civil Justice Committee Amendment Packet

March 15, 2006
10:00 AM – 11:00 AM
24 House Office Building

Allan G. Bense
Speaker

Mark Mahon
Chair

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 0907**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Civil Justice Committee

Representative(s) Machek offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Paragraph (c) of subsection (1) of section 125.0103, Florida Statutes, is amended to read:

125.0103 Ordinances and rules imposing price controls; findings required; procedures.--

(1)

(c)1. Counties must establish maximum rates which may be charged on the towing of vehicles from or immobilization of vehicles on private property, removal and storage of wrecked or disabled vehicles from an accident scene or for the removal and storage of vehicles, in the event the owner or operator is incapacitated, unavailable, leaves the procurement of wrecker service to the law enforcement officer at the scene, or otherwise does not consent to the removal of the vehicle. However, if a municipality chooses to enact an ordinance establishing the maximum fees for the towing or immobilization of vehicles as described in paragraph (b), the county's ordinance shall not apply within such municipality.

2. Beginning July 1, 2007, and notwithstanding any other provision of law, in any county which has not adopted an ordinance establishing the maximum rates which may be charged for the towing and storage of vehicles as required by s. 125.0103 and s. 166.043, such rates shall be equal to the rates established by the Division of Florida Highway Patrol under s. 321.051, and adjusted annually to reflect the consumer price index. No county may adopt an ordinance establishing a rate which is less than that rate established by the Division of Florida Highway Patrol which shall also be adjusted annually to reflect the consumer price index.

Section 2. Paragraph (c) of subsection (1) of section 166.043, Florida Statutes, is amended to read:

166.043 Ordinances and rules imposing price controls; findings required; procedures.--

(1)

(c)1. Counties must establish maximum rates which may be charged on the towing of vehicles from or immobilization of vehicles on private property, removal and storage of wrecked or disabled vehicles from an accident scene or for the removal and storage of vehicles, in the event the owner or operator is incapacitated, unavailable, leaves the procurement of wrecker service to the law enforcement officer at the scene, or otherwise does not consent to the removal of the vehicle. However, if a municipality chooses to enact an ordinance establishing the maximum fees for the towing or immobilization of vehicles as described in paragraph (b), the county's ordinance established under s. 125.0103 shall not apply within such municipality.

2. Beginning July 1, 2007, and notwithstanding any other provision of law, in any county which has not adopted an

ordinance establishing the maximum rates which may be charged for the towing and storage of vehicles as required by s. 125.0103 and s. 166.043, such rates shall be equal to the rates established by the Division of Florida Highway Patrol under s. 321.051, and adjusted annually to reflect the consumer price index. No county may adopt an ordinance establishing a rate which is less than that rate established by the Division of Florida Highway Patrol which shall also be adjusted annually to reflect the consumer price index.

Section 3. Subsection (2) of section 321.051, Florida Statutes, is amended to read:

321.051 Florida Highway Patrol wrecker operator system; penalties for operation outside of system.--

(2) The Division of Florida Highway Patrol of the Department of Highway Safety and Motor Vehicles is authorized to establish within areas designated by the patrol a wrecker operator system using qualified, reputable wrecker operators for removal and storage of wrecked or disabled vehicles from a crash scene or for removal and storage of abandoned vehicles, in the event the owner or operator is incapacitated or unavailable or leaves the procurement of wrecker service to the officer at the scene. All reputable wrecker operators shall be eligible for use in the system provided their equipment and drivers meet recognized safety qualifications and mechanical standards set by rules of the Division of Florida Highway Patrol for the size of vehicle it is designed to handle. The division is authorized to limit the number of wrecker operators participating in the wrecker operator system, which authority shall not affect wrecker operators currently participating in the system established by this section. The division must ~~is authorized to~~ establish maximum rates for the towing and storage of vehicles

removed at the division's request, where such rates have not been set by a county or municipality pursuant to s. 125.0103 or s. 166.043. These rates must be adjusted annually based on the consumer price index. Such rates shall not be considered rules for the purpose of chapter 120; however, the department shall establish by rule a procedure for setting such rates. Any provision in chapter 120 to the contrary notwithstanding, a final order of the department denying, suspending, or revoking a wrecker operator's participation in the system shall be reviewable in the manner and within the time provided by the Florida Rules of Appellate Procedure only by a writ of certiorari issued by the circuit court in the county wherein such wrecker operator resides.

Section 4. Paragraph (d) is added to subsection (1), subsection (4), subsection (6), paragraphs (b) and (c) of subsection (11), paragraph (d) of subsection (12), and paragraphs (a) and (g) of subsection (13), of section 713.78, Florida Statutes, are amended to read:

713.78 Liens for recovering, towing, or storing vehicles and vessels.--

(1) For the purposes of this section, the term:

(d) "Department" means the Department of Highway Safety and Motor Vehicles.

(4)(a) Any person regularly engaged in the business of recovering, towing, or storing vehicles or vessels who comes into possession of a vehicle or vessel pursuant to subsection (2), and who claims a lien for recovery, towing, or storage services, shall give notice to the registered owner, the insurance company insuring the vehicle notwithstanding the provisions of s. 627.736, and to all persons claiming a lien thereon, by submitting an application for notifications to the

department on a form prescribed by the department within 7 business days after the date of storage of the vehicle or vessel ~~as disclosed by the records in the Department of Highway Safety and Motor Vehicles or of a corresponding agency in any other state~~.

(b) Whenever any law enforcement agency authorizes the removal of a vehicle or vessel or whenever any towing service, garage, repair shop, or automotive service, storage, or parking place notifies the law enforcement agency of possession of a vehicle or vessel pursuant to s. 715.07(2)(a)2., the applicable law enforcement agency shall contact the department ~~of Highway Safety and Motor Vehicles~~, or the appropriate agency of the state of registration, if known, within 24 hours through the medium of electronic communications, giving the full description of the vehicle or vessel. Upon receipt of the full description of the vehicle or vessel, the department shall search its files to determine the owner's name, the insurance company insuring the vehicle or vessel, and whether any person has filed a lien upon the vehicle or vessel as provided in s. 319.27(2) and (3) and notify the applicable law enforcement agency within 72 hours. The person in charge of the towing service, garage, repair shop, or automotive service, storage, or parking place shall obtain such information from the applicable law enforcement agency within 5 days after the date of storage and shall give notice pursuant to paragraph (a). ~~The department may release the insurance company information to the requestor notwithstanding the provisions of s. 627.736.~~

(c) Upon receipt of a valid and complete application for notifications, the required notification fee of $4, and service fees as indicated in s. 320.04, the department shall notify ~~Notice by certified mail, return receipt requested, shall be~~

~~sent within 7 business days after the date of storage of the vehicle or vessel to~~ the registered owner, the insurance company insuring the vehicle notwithstanding the provisions of s. 627.736, and all persons of record claiming a lien against the vehicle or vessel. The notification ~~It~~ shall ~~state the fact of~~ indicate the company or individual who has possession of the vehicle or vessel, that a lien as provided in subsection (2) is claimed, that charges have accrued and the amount thereof, that the lien is subject to enforcement pursuant to law, and that the owner or lienholder, if any, has the right to a hearing as set forth in subsection (5), and that any vehicle or vessel which remains unclaimed, or for which the charges for recovery, towing, or storage services remain unpaid, may be sold free of all prior liens after 35 days if the vehicle or vessel is more than 3 years of age or after 50 days if the vehicle or vessel is 3 years of age or less.

(d) If the department is unable ~~attempts~~ to locate the name and address of the owner or lienholder ~~prove unsuccessful~~, the department shall notify the towing-storage operator. Upon receipt of such notification from the department, the towing-storage operator shall~~, after 7 working days, excluding Saturday and Sunday, of~~ conduct a good faith effort through ~~the initial tow or storage, notify the public agency of jurisdiction in writing by certified mail or acknowledged hand delivery that the towing-storage company has been unable to locate the name and address of the owner or lienholder and~~ a physical search of the vehicle or vessel to attempt to determine ~~has disclosed no~~ ownership information ~~and a good faith effort has been made~~. If the physical search reveals a potential owner, lienor, or insurance company, the towing-storage operator shall furnish

notice of the sale to such owner, lienor, or insurance company by certified mail.

(e) For purposes of this subsection ~~paragraph~~ and subsection (9), "good faith effort" means that the following checks have been performed by the company to establish prior state of registration and for title:

1. Check of vehicle or vessel for any type of tag, tag record, temporary tag, or regular tag.

2. Check of law enforcement report for tag number or other information identifying the vehicle or vessel, if the vehicle or vessel was towed at the request of a law enforcement officer.

3. Check of trip sheet or tow ticket of tow truck operator to see if a tag was on vehicle or vessel at beginning of tow, if private tow.

4. If there is no address of the owner on the impound report, check of law enforcement report to see if an out-of-state address is indicated from driver license information.

5. Check of vehicle or vessel for inspection sticker or other stickers and decals that may indicate a state of possible registration.

6. Check of the interior of the vehicle or vessel for any papers that may be in the glove box, trunk, or other areas for a state of registration.

7. Check of vehicle for vehicle identification number.

8. Check of vessel for vessel registration number.

9. Check of vessel hull for a hull identification number which should be carved, burned, stamped, embossed, or otherwise permanently affixed to the outboard side of the transom or, if there is no transom, to the outmost seaboard side at the end of the hull that bears the rudder or other steering mechanism.

(6) Any vehicle or vessel which is stored pursuant to subsection (2) and which remains unclaimed, or for which reasonable charges for recovery, towing, or storing remain unpaid, and any contents not released pursuant to subsection (10), may be sold by the owner or operator of the storage space for such towing or storage charge after 35 days from the time the vehicle or vessel is stored therein if the vehicle or vessel is more than 3 years of age or after 50 days following the time the vehicle or vessel is stored therein if the vehicle or vessel is 3 years of age or less. The sale shall be at public auction for cash. ~~If the date of the sale was not included in the notice required in subsection (4), notice of the sale shall be given to the person in whose name the vehicle or vessel is registered and to all persons claiming a lien on the vehicle or vessel as shown on the records of the Department of Highway Safety and Motor Vehicles or of the corresponding agency in any other state. Notice shall be sent by certified mail, return receipt requested, to the owner of the vehicle or vessel and the person having the recorded lien on the vehicle or vessel at the address shown on the records of the registering agency and shall be mailed not less than 15 days before the date of the sale. After diligent search and inquiry, if the name and address of the registered owner or the owner of the recorded lien cannot be ascertained, the requirements of notice by mail may be dispensed with.~~ In addition to the notice by mail, public notice of the time and place of sale shall be made by publishing a notice thereof one time, at least 10 days prior to the date of the sale, in a newspaper of general circulation in the county in which the sale is to be held. <u>The public notice shall include the vehicle or vessel identification or hull number, a description of the vehicle or vessel including make, model, and</u>

year of manufacture, and, if known, the name of the registered owner of the vehicle or vessel. The proceeds of the sale, after payment of reasonable towing and storage charges, and costs of the sale, in that order of priority, shall be deposited with the clerk of the circuit court for the county if the owner is absent, and the clerk shall hold such proceeds subject to the claim of the person legally entitled thereto. The clerk shall be entitled to receive 5 percent of such proceeds for the care and disbursement thereof. The certificate of title issued under this law shall be discharged of all liens unless otherwise provided by court order.

(11)

(b) The department ~~of Highway Safety and Motor Vehicles~~ shall charge a fee of $3 for each certificate of destruction. A service charge of $4.25 shall be collected and retained by the tax collector who processes the application.

~~(c) The Department of Highway Safety and Motor Vehicles may adopt such rules as it deems necessary or proper for the administration of this subsection.~~

(12)

(d) Employees of the department ~~of Highway Safety and Motor Vehicles~~ and law enforcement officers are authorized to inspect the records of any person regularly engaged in the business of recovering, towing, or storing vehicles or vessels or transporting vehicles or vessels by wrecker, tow truck, or car carrier, to ensure compliance with the requirements of this section. Any person who fails to maintain records, or fails to produce records when required in a reasonable manner and at a reasonable time, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(13)(a) Upon receipt by the department ~~of Highway Safety and Motor Vehicles~~ of written notice from a wrecker operator who claims a wrecker operator's lien under paragraph (2)(c) or paragraph (2)(d) for recovery, towing, or storage of an abandoned vehicle or vessel upon instructions from any law enforcement agency, for which a certificate of destruction has been issued under subsection (11), the department shall place the name of the registered owner of that vehicle or vessel on the list of those persons who may not be issued a license plate or revalidation sticker for any motor vehicle under s. 320.03(8). If the vehicle or vessel is owned jointly by more than one person, the name of each registered owner shall be placed on the list. The notice of wrecker operator's lien shall be submitted on forms provided by the department, which must include:

1. The name, address, and telephone number of the wrecker operator.

2. The name of the registered owner of the vehicle or vessel and the address to which the wrecker operator provided notice of the lien to the registered owner under subsection (4).

3. A general description of the vehicle or vessel, including its color, make, model, body style, and year.

4. The vehicle identification number (VIN); registration license plate number, state, and year; validation decal number, state, and year; vessel registration number; hull identification number; or other identification number, as applicable.

5. The name of the person or the corresponding law enforcement agency that requested that the vehicle or vessel be recovered, towed, or stored.

6. The amount of the wrecker operator's lien, not to exceed the amount allowed by paragraph (b).

(g) The department ~~of Highway Safety and Motor Vehicles~~ may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section ~~subsection~~.

Section 6. This act shall take effect July 1, 2006.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to recovering, towing, or storing vehicles and vessels; amending s. 125.0103, F.S.; providing counties which have not established maximum rates for the towing and storage of vehicles shall have the rate established by the Florida Highway Patrol; amending s. 166.043, F.S.; providing counties which have not established maximum rates for the towing and storage of vehicles shall have the rate established by the Florida Highway Patrol; amending s. 321.051, F.S.; requiring the Florida Highway Patrol to set presumptive towing and storage rates for the removal of wrecked or disabled vehicles; requiring future rate increases based on the consumer price index; amending s. 713.78, F.S.; creating a definition; requiring the Department of Highway Safety and Motor Vehicles to notify by mail the owner, insurance company, and persons claiming a lien against the vehicle or vessel that the vehicle or vessel is subject to a lien for recovery, towing, or storage; requiring a fee; removing requirement that towing-storage operator notify

the owner, insurance company, and persons claiming a lien against the vehicle or vessel; revising certain public notice requirements relating to the sale of unclaimed vehicles or vessels; providing for rulemaking; providing an effective date.